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WILCOX & CO

No. 6173

Vol 1682

United States Circuit Court of Appeals

For the Ninth Circuit.

GRACE LOW,

Appellant,

vs.

SUTHERLIN, BARRY & COMPANY, INC., and JOHN E. SUTHERLIN,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Appellant:

EWELL D. MOORE, Esq.,
Title Insurance Building;

D. A. KNAPP, Esq.,
Subway Terminal Building.

For Appellees:

JOSEPH L. LEWINSON, Esq.,
Bartlett Building, Los Angeles, California;

L. R. MARTINEAU, Esq.,
Roosevelt Building.

United States of America, ss.

To SUTHERLIN BARRY & COMPANY, INC., and JOHN E. SUTHERLIN, defendants: Greeting:

You are hereby cited and adminished to be and appear at a United States Circuit of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 8th day of February, A. D. 1930, pursuant to an order allowing an appeal filed and entered in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain suit, being No. 3324-M, wherein Grace E. Low is plaintiff and you are defendants and appellees, to show cause, if any there be, why the judgment rendered against the said appellant as in the said order mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM P. JAMES United States District Judge for the Southern District of California, this 9th day of January, A. D. 1930, and of the Independence of the United States, the one hundred and fifty-fourth

Wm. P. James
U. S. District Judge for the Southern District of California.

[Endorsed]: Copy received Jan 10, 1930 Joseph L. Lewinson L R. Martineau Jr Attorneys for defendants Filed Jan 11 1930 R. S. Zimmerman, Clerk By M. L. Gaines Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

GRACE E. LOW, Plaintiff,	:	
-vs-	:	3324 M
SUTHERLIN BARRY & COMPANY, INC., and JOHN E. SUTHERLIN, Defendants.	:	COMPLAINT (In Damages)

Plaintiff complains, and for cause of action against the defendants alleges:

I.

That jurisdiction of this case arises and is conferred on this Honorable Court by reason of the diversity of citizenship of the parties hereto. That the plaintiff Grace E. Low, is a citizen of the State of California and a resident of the County of Los Angeles; that the defendant John E. Sutherlin, is a citizen of the State of Louisiana, and the defendant Sutherlin Barry & Company Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Louisiana and authorized to do and doing business in the State of California.

II.

That on and prior to the 29th day of June 1925, plaintiff was the owner in fee of certain real property, one parcel of which was situated in the City of Los Angeles, and one of which was situated in the City of Venice, both in the County of Los Angeles, State of California; the

property located in Los Angeles being described as follows:

That portion of Lots 12, 13 and 14, in Block 108, of Bellevue Terrace Tract, in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in Book 2, page 585, Miscellaneous Records of said County, described as follows:

Beginning at a point in the Northerly line of Fifth Street, distant 65 feet Easterly from its intersection with the Easterly line of Hope Street; thence Easterly along said line of Fifth Street, 85 feet to its intersection with the Westerly line of a 12 foot alley (so-called); thence along said Westerly line, Northerly and parallel with the Easterly line of said Lots 12, 13 and 14, 142 feet; thence Westerly parallel with the Northerly line of Fifth Street, 85 feet; thence Southerly 142 feet to the point of beginning;

Together with the improvements thereon consisting of a six-story and full basement, Class "A" reinforced concrete apartment hotel in good repair, having 212 rooms sub-divided as follows:

Twelve (12) double apartments consisting of living room and dining room, each equipped with double disappearing beds, kitchen and bath; seventy-five (75) single apartments consisting of combination living and dining room containing one double disappearing bed; kitchen and bath; and seven (7) transient hotel rooms;

The property located in Venice being described as follows:

Lots "P" and "R" of Venice of America, in the City of Venice, County of Los Angeles, State of California, as per map recorded in Book 6, Pages 126 and 127 of Maps, in the office of the County Recorder of said County,

which property consists of approximately three acres of land, and on which are located twenty-seven (27) single cottages, three (3) double cottages, one (1) store and a garage of fourteen (14) stalls, all being of frame construction and in good state of repair;

Said property first above described is sometimes hereinafter referred to as the "Engstrum Property", and the property located in Venice is sometimes hereinafter referred to as the "Venice Property".

III.

That at all times herein mentioned defendant, Sutherlin Barry & Company, Inc., was, and still is, a corporation engaged in the business of financing, dealing in and selling investment bonds and underwriting issues of the same, and that defendant John E. Sutherlin at all times herein mentioned was and still is, the president and manager thereof and the principal stockholder therein, and as such carried out all of the acts and things herein complained of for and on behalf of said defendant corporation.

IV.

That prior to the 29th day of June 1925, said defendants by and through said defendant John E. Sutherlin, with the intent and purpose of developing and perfecting a scheme whereby plaintiff would be wrongfully deprived of her said property and the whole thereof by defendants, without any consideration whatsoever, did then begin and thereafter continue a series of steps hereafter set forth in the order and effect thereof as follows:

That, as the first step in the development of said scheme aforesaid, said defendants proposed to plaintiff in general terms a plan for funding the several obligations then and there existing against plaintiff, in which said plan defend-

ant Sutherlin, Barry & Company Inc., would take up and pay off all the then existing obligations against plaintiff's said Engstrum property, and in consideration therefor would cause bonds to be issued under a Trust Indenture and sold to defendant Sutherlin, Barry & Company Inc., in the amount that might be found necessary to relieve plaintiff from every then existing obligation against said Engstrum property, save and except the amount of bonds issued under said Trust Indenture, said bonds under said Trust Indenture to be secured by all of plaintiff's said Engstrum property herein described, and to bear interest at Seven Percent per annum; said bonds to be payable as to both principal and interest in such amounts and at such periods of time over a term of years as plaintiff could safely undertake in full view of the actual and potential income of her said Engstrum property. And to that end defendants proposed to plaintiff they would utilize their wide and varied financial experience to prepare a careful and conservative "set-up" upon which future negotiations plaintiff might safely act in the premises.

VI.

That plaintiff was without experience as to such matters and so stated to defendants, which fact defendants then and there well knew.

VII.

That, as a second step in developing said scheme aforesaid, defendants by and through defendant John E. Sutherlin, did prepare and exhibit to plaintiff a plan commonly called in the financial business a "set-up", containing on the one hand the actual and potential income of plaintiff's said Engstrum property projected over a term of years, and purporting to contain on the other hand all the

charges, expenses, fees and costs, as well as the payments of interest and amortization payments to retire said bonds, over a term of fifteen years from the date thereof, all of which purported to show to plaintiff that she could safely enter into said transaction and carry and pay all of the obligations she would assume under the said "set-up" so proposed by defendants; that then and thereupon and in furtherance thereof, defendants, by and through defendant John E. Sutherlin, falsely and fraudulently represented to plaintiff that by reason of the long experience of defendants in the finance and bond business that they, the defendants, could and did guarantee to plaintiff the truth and accuracy of the said "set-up" and particularly that it contained all the charges, expenses, fees, interest, payments and costs plaintiff would be called upon to bear and to pay in said transaction; that said defendants then and there well knew that in truth and in fact there would be charges and expenses against plaintiff in said proposed transaction other than, and in addition to the charges, expenses, fees, costs, interest and payments which said defendants had included in said "set-up" prepared by them and exhibited to plaintiff as aforesaid; that defendants, by and through said defendant John E. Sutherlin, made said statements to plaintiff with the intent and for the purpose of deceiving and misleading plaintiff and inducing her to enter into the said transaction, and plaintiff in reliance thereon thereupon agreed to continue said negotiations with defendants on the basis of said representation and said "set-up".

VIII.

That, as the third step in the development of said scheme, defendants on or about April 22, 1925, prepared

and presented to plaintiff a writing which in form purported to be a proposal or offer by plaintiff to defendant Sutherlin, Barry & Company, Inc., to fund her several obligations against said Engstrum property, and to issue and sell to said defendant Sutherlin, Barry & Company Inc., First Mortgage Seven Percent Bonds secured by a Trust Indenture, covering plaintiff's said Engstrum property; and then and there defendants, by and through said defendant John E. Sutherlin, falsely and fraudulently stated to plaintiff that the said writing in its full effect contained all of the oral proposals first submitted by defendants to plaintiff as aforesaid, and in its full effect contained the substance and purport of the said "set-up" as to the said Engstrum property; that defendants made said statements to plaintiff knowing them to be false, with the intent and purpose of deceiving and misleading plaintiff and inducing her to execute the said writing, and knowing that plaintiff was ignorant of the true nature and effect of the statements in said purported proposal contained; that plaintiff relied upon defendants oral representations aforesaid and executed and delivered to defendants on said date said writing, a copy of which is attached hereto, made a part hereof and marked Exhibit "A"; that immediately thereafter, plaintiff, in order to carry out her part of said transaction, incurred large expenses by virtue of defendants' said representations and of said writing, Exhibit "A", and to meet which exhausted her financial resources, which defendants then and there knew would result therefrom, and said expenses so incurred left plaintiff helpless to resist any further demands that might be made upon her in connection therewith, a fact well known to defendants, and by them calculated as a means to the ends hereinbefore set forth.

IX.

That, thereafter, and as the fourth step in further developing said scheme as aforesaid and in conversations between plaintiff and defendant John E. Sutherlin for and in behalf of defendant Sutherlin, Barry & Company, Inc., it was orally agreed that the said transaction under Exhibit "A" should be enlarged and extended to include plaintiff's said Venice real property, herein described, under the same terms and conditions set forth in said "set-up" and in said proposal of April 22, 1925, Exhibit "A", save and except as to the amount of the bonds to be issued and the interest and amortization payments arising therefrom;

That thereafter and on the 29th day of June 1925, and subsequent to the incurring of heavy costs, expenses, charges and fees by plaintiff, as aforesaid, including the costs, expenses, charges and fees incurred by plaintiff incident to the inclusion of the said Venice property, as aforesaid, defendants, contrary to their express promises and representations to plaintiff as aforesaid, suddenly and on June 29, 1925, demanded of plaintiff the payment of the sum of $5900.00 in addition to and in excess of the sum of all other charges, costs, fees, expenses, interest and payments theretofore provided to be paid by her under said "set-up" and said proposal of April 22, 1925, Exhibit "A"; that upon plaintiff's protests against defendants' said demand for said additional sum, defendants, by and through defendant John E. Sutherlin, stated to plaintiff that unless she then and there agreed to pay said $5900.00 so demanded, defendants would immediately withdraw from said transaction and all the expenses, charges, and fees theretofore incurred by plaintiff as aforesaid, would be upon her shoulders; that by reason of said demand of

defendants and the said large expenses, charges and fees theretofore incurred as aforesaid, plaintiff was placed in a desperate financial situation, and in consequence thereof was forced to, and did, accede to defendants' demands and agreed to pay defendants said sum of $5900.00, and then and there executed an agreement to pay said sum, which said agreement was then and there prepared and presented to plaintiff by defendants by and through defendant John E. Sutherlin, a copy of which agreement is attached hereto, made a part hereof and marked Exhibit "B". That thereupon and on said June 29, 1925, defendants, by and through defendant John E. Sutherlin, presented to plaintiff a further proposal, previously prepared by said defendants, enlarging and extending said proposal of April 22, 1925, to include plaintiff's said Venice real property as well as her said Engstrum property and providing for a Trust Indenture and the issuance of bonds thereunder in the sum of $360,000.00, which plaintiff then and there executed and delivered to defendants, a copy of which is attached hereto, made a part hereof, and marked Exhibit "C".

X.

That prior to executing the said second proposal of June 29, 1925, (Exhibit "C") as aforesaid, and on said date plaintiff called the attention of defendants and particularly of defendant John E. Sutherlin, to the provisions therein contained as to the insurance required to be placed and paid for by plaintiff upon her said Engstrum and Venice properties herein described, and stated to said defendants that said insurance requirements therein did not appear to be in accordance with the said "set-up" as prepared by them and exhibited to plaintiff as aforesaid; that there-

upon and in response thereto, defendants, by and through said defendant John E. Sutherlin, falsely and fraudulently stated to plaintiff that the insurance then in force and paid for by plaintiff upon all of her said properties, would be sufficient to meet the defendants' requirements in the premises and that there would be no necessity for further insurance thereon except in a small amount, the cost of which would be provided for out of the excess from said bond issue over and above all the other costs, expenses, fees and payments provided for in said Trust Indenture, and that said additional costs for said additional insurance would be merely nominal and would not work a hardship upon plaintiff, and that by reason of the fact that said expense for said additional insurance would be merely nominal, plaintiff would not only be able to pay from said bond sale proceeds said insurance, but that plaintiff would also receive a substantial balance from the proceeds of the sale of said bonds to be issued under said Trust Indenture, from which said balance plaintiff could pay all of the charges and expenses, and establish a reserve to meet the interest payments as they became due upon said bonds; that plaintiff in reliance upon said statements and representations of defendants as aforesaid, was induced to and did execute the said proposal of June 29, 1925, (Exhibit "C") and did proceed to the further consummation of said transaction;

That notwithstanding said representations of defendants to plaintiff as aforesaid, defendants then and there secretly connived to, and thereafter did, saddle upon plaintiff additional insurance charges in the amount of $3,275.95; that there was no balance due plaintiff from the sale of said bonds with which to pay said additional insur-

ance charges and that said defendants and each of them, at all times herein mentioned well knew that there would be no such balance, and well knew that said charges for said additional insurance could not be paid by plaintiff from any balance from the sale of said bonds, and well knew that said charges for said additional insurance would go far toward creating a default by plaintiff by reason of which defendants could secure the sale of said properties to said defendant Sutherlin, Barry & Company, Inc; that said representations as aforesaid were in direct contravention to the representations theretofore made by defendants to plaintiff, as aforesaid.

XI.

That thereafter, and as the fifth step in said scheme aforesaid, defendants prepared and by through defendant John E. Sutherlin, submitted to plaintiff a form of Trust Indenture covering all of plaintiff's said real property herein described, and at or about the same time prepared and presented to plaintiff, and plaintiff executed, an application to the Corporation Commissioner of the State of California for a permit to issue and sell to defendant Sutherlin, Barry & Company Inc., the bonds provided for under said Trust Indenture in the sum of $360,000, and defendants thereupon placed the entire transaction in escrow with the Citizens Trust and Savings Bank of Los Angeles, California, the Trustee named in said Trust Indenture. That thereafter, and upon August 12, 1925, a permit was issued by said Corporation Commissioner authorizing plaintiff to sell and issue to defendant Sutherlin, Barry & Company Inc., said bonds in said amount of $360,000 at ninety cents on the dollar, all subject to and under the conditions of the said Trust Indenture, a copy

of which is attached hereto, made a part hereof and marked Exhibit "D".

That the said application for said permit to issue and sell said bonds was prepared by defendant and that the entire proceedings thereto pertaining were carried on by said defendants, all without knowledge of plaintiff as to the details or practical purport thereof, and that said defendants at all times herein mentioned well knew that plaintiff did not have knowledge of such details or practical purport and particularly that she had no comprehension or understanding of the ultimate effect of said permit, to-wit: that the sale of said bonds thereunder would result in a bonus to defendant Sutherlin, Barry & Company, Inc., in the sum of $36,000 and that plaintiff would be deprived of said sum from the proceeds of the sale of said bonds.

XII.

That, as the sixth step in the development of said scheme aforesaid, and on the 23rd. day of September 1925, and at the time of the closing of said escrow at said Citizens Trust & Savings Bank, and at a time when the said Trustee had notified the parties hereto that there would be a balance of but Fifty Dollars in favor of plaintiff from the proceeds of the sale of said bonds to defendant Sutherlin, Barry & Company, Inc., after meeting the charges, costs, expenses and fees in said transaction incurred (the Trustee not referring however, to the insurance charges set up in paragraph X. herein) said defendants, by and through defendant John E. Sutherlin, suddenly demanded of plaintiff the immediate and unconditional payment of the said sum of $5,900.00, referred to in paragraph IX. hereinabove, and defendants then and there by and through defendant John E. Sutherlin, declared that unless said charge

of $5,900.00 was immediately settled by plaintiff in the manner and form by them demanded, they, the defendants, would refuse to go further in said transaction and would leave to plaintiff the payment of all the charges, expenses and costs theretofore provided for in said proposal of June 29, 1925, which plaintiff had incurred in good faith, and any and all other items of expense charged or chargeable to plaintiff in the premises; that the manner and form of settlement of said charge of $5,900.00 thus demanded by defendants was as follows: that plaintiff execute two promissory notes in the sum of $2,950.00 each, payable in ninety and one hundred and twenty days respectively with interest thereon at Seven Percent and Six Percent respectively, per annum; and plaintiff, solely by reason of the facts hereinabove set forth, thereupon did execute and deliver said two promissory notes to defendants.

That at all times hereinbefore mentioned defendants intended said charges of said $5,900.00 to be made against plaintiff, and said charges were so made against plaintiff, in deliberate contravention of the promises and representations of defendants to plaintiff made as hereinbefore set forth.

That thereafter defendant Sutherlin, Barry & Company, Inc., sold one of said promissory notes to a purported innocent purchaser who immediately demanded payment thereof and sued plaintiff thereon, and garnisheed a large number of plaintiff's tenants occupying said Engstrum property, thereby resulting in the vacating by such persons of plaintiff's said premises and the consequent and continuing curtailment of plaintiff's income therefrom;

That at all times herein mentioned defendants intended, designed and contemplated the results of their aforesaid acts, to-wit: that plaintiff would be deprived of a large part of her income from her said Engstrum property and by reason thereof would default in the payment of the charges and expenses under said Trust Indenture and the interest on said bonds, and thereby would provide defendants with legal excuse to declare a default thereunder and to demand that said Trustee sell all of plaintiff's said properties under said Trust Indenture, in order that defendant Sutherlin Barry & Company Inc., might buy said properties at said sale and secure the same to themselves without consideration to plaintiff for her interest therein.

That said results to plaintiff did in fact follow the aforesaid acts of defendants and plaintiff was in fact thereby deprived of a large part of her income theretofore received from said Engstrum property, and plaintiff was in fact thereby prevented from paying the charges, costs and expenses placed against her by defendants in connection with said transaction aforesaid, and was in fact thereby prevented from paying the interest on said bonds as and when the same became due, and plaintiff, as a consequence thereof, was thereby and thereafter deprived of her said real property and the whole thereof, as the same existed in her prior to the said 29th day of June 1925.

XIII.

That, as the seventh step in the aforesaid scheme, defendant Sutherlin Barry & Company Inc., on the 23rd. day of December 1925, notified plaintiff in writing that unless certain insurance premiums upon the additional insurance defendants required plaintiff to place upon her said property as aforesaid, were not immediately paid by plaintiff

by way of reimbursement to the said Citizens Trust & Savings Bank, the Trustee, then the said defendant Sutherlin Barry & Company Inc., would at once elect to request said Trustee to declare the entire principal sum of said bonds, to-wit, $360,000, due and payable, and would take further steps appropriate in the premises; that said defendants and each of them well knew at the time of making said demand upon plaintiff, and well knew from the beginning of said transaction, that their said minipulations of the entire transaction affecting plaintiff's said properties under said Trust Indenture had made it impossible for plaintiff to immediately pay said insurance charges or to immediately pay the other charges, costs and expenses placed against plaintiff as aforesaid, or to immediately pay the interest then accruing on said bonds;

That thereafter and on March 1st. 1926, the said Trustee, pursuant to the request of said defendant Sutherlin Barry & Company Inc., served written notice upon plaintiff declaring plaintiff in default under the terms of said Trust Indenture, and further declaring the entire principal of said bonds, to-wit, $360,000 immediately due and payable.

XIV.

That thereafter, and as the eighth step in furtherance of said scheme, defendants prepared a form of proposal in writing from plaintiff to defendant Sutherlin Barry & Company Inc., a copy of which is attached hereto and marked Exhibit "E"; which said proposal defendant John E. Sutherlin presented to plaintiff on June 4th, 1926, and plaintiff, in reliance upon the statements of said defendant John E. Sutherlin as to the purport and effect thereof upon plaintiff's rights and interest in said properties, and

induced wholly by said statements, did thereupon execute and deliver to defendants said proposal on said date, and defendant John E. Sutherlin accepted the same for and on behalf of defendant Sutherlin Barry & Company Inc. That said statements of defendant John E. Sutherlin made to plaintiff on said date and prior to her signing said proposal were:

That the purport and effect of said instrument was: that if plaintiff would place a manager to be named by defendants in charge of all of said real, and her personal property hereinafter set forth, and surrender the same to the use of defendants, and also would surrender to defendants all of the income therefrom, and cause all of her said personal property in or upon said real property to be subjected to the same general lien created by said Trust Indenture, defendants would as consideration therefor credit the said income to the payment requirements under the said Trust Indenture, and would cause the Trustee to postpone the sale of said real property then pending to October 5th, 1926, and also would cause the said declaration of said Trustee accelerating the maturity of said bonds to be rescinded and thus restore the said real property to its former status under said Trust Indenture, provided, plaintiff should pay to the said Trustee prior to October 5th, 1926, all of the sums necessary to cure the default theretofore declared to exist in said Trustee's notice, together with all charges, costs and expenses accrued at the date of such payment.

That plaintiff thereafter did all and singular the things by defendants stated as aforesaid that she would be required to do in order to secure a postponement of the sale of her said real property, including the placing of defend-

ants' manager in charge of her said personal and real property, and surrendering the income therefrom to defendants; but defendants thereafter in direct contravention of their said statements, representations and promises, failed and refused to cause the said Trustee to postpone the sale of said real property to October 5th, 1926, and failed and refused to cause the Trustee to rescind its said declaration accelerating the maturity of the entire principal of said bonds and to restore said real property to the status existing prior to said declaration of default under said Trust Indenture, all in spite of the fact that plaintiff upon the 12th day of August 1926, procured and presented to defendants a person ready, able and willing then and there and on said date, to pay to said Trustee all charges, costs, expenses and interest declared by said Trustee to be due from plaintiff under said Trust Indenture or otherwise charged against her in the premises;

That at the time said defendants by and through defendant John E. Sutherlin made said false and fraudulent representations to plaintiff, to-wit, on June 4th, 1926, defendants did not intend to postpone said Trustee's sale to October 5th, 1926, in order to permit plaintiff to obtain the money necessary to cure her said default, and did not intend to cause the Trustee to rescind its said declaration accelerating the maturity of the entire principal of said bonds, and did not intend to cause said Trust Indenture to be restored to its original force and effect; and defendants and each of them well knew said plaintiff relied upon said false and fraudulent statements and representations of defendants as aforesaid; that plaintiff would not have surrendered the control of said real and personal property and the income therefrom to the manager and agent of

defendant Sutherlin Barry & Company Inc., as aforesaid, save and except in her said reliance thereon.

XV.

That at the time said defendants made said false and fraudulent statements and representations to plaintiff as aforesaid, to-wit, on June 4th, 1926, they, and each of them, well knew that in the event and upon the placing of the said manager of defendant Sutherlin Barry & Company Inc., in charge of plaintiff's said property and allowing him to collect and take the income therefrom for said defendant Sutherlin Barry & Company Inc., that plaintiff would thereafter be thwarted and prevented from receiving her customary and usual income therefrom and thereby would be prevented from paying her obligations under said Trust Indenture: and the defendants and each of them purposed and intended at the time they made said false and fraudulent representations that plaintiff should never again come into control of her said real and personal property; that defendant Sutherlin Barry & Company Inc., upon placing its said manager in control of plaintiff's said property and the income therefrom, so manipulated the same, including the income therefrom, that plaintiff was prevented from receiving her customary and usual income and plaintiff was to the degree of said decrease of income thereby prevented from paying her interest and other charges under said Trust Indenture;

That in truth and in fact said defendant Sutherlin Barry & Company Inc., ever since has held possession and control of all of plaintiff's said property, both real and personal, and still continues to hold the same against the will and without the consent of plaintiff and without right therein

or justification therefor, save and except as to such part thereof as they have, in violation of good faith and fair dealing in the premises sold, caused to be sold, or have otherwise disposed of, without paying any of the proceeds of said sale or sales to plaintiff, and without legal right or justification therefor in the premises.

That defendants, in utter disregard of their said agreement of June 4th, 1926, to postpone the sale of said real property to October 5th, 1926, as aforesaid, caused said sale to be postponed only to August 12th, 1926, and did then and there and on said last date mentioned, cause said real property to be sold by said Trustee to defendant Sutherlin Barry & Company Inc. That said sale was designed by said defendants to be held, and was in truth and in fact so held, without opposing bidders; that said defendants in utter violation of good faith and well knowing that the valuation of plaintiff's said real property as fixed in the appraisal caused to be made by defendant Sutherlin Barry & Company Inc., was in excess of $650,000, caused said real property to be sold by said Trustee to defendant Sutherlin Barry & Company Inc., and defendant Sutherlin Barry & Company Inc. purchased said property at said sale for $292,500. That defendant Sutherlin Barry & Company Inc. purchased said real property at said sale at said price of $292,500 with the intent and for the purpose of thereafter, and at its convenience, filing suit and obtaining a deficiency judgment against plaintiff in the premises, and of executing such judgment upon said personal property and the whole thereof, to the end that said defendant Sutherlin Barry & Company Inc. might secure to itself said personal property without consideration to plaintiff therefor.

XVI.

That at all times hereinbefore mentioned plaintiff was the owner of all and singular the personal property in and upon the real property herein described, to-wit, the said Engstrum and said Venice properties; that said personal property consisted of complete household furniture, furnishings and equipment ordinarily required and used in the apartment house and hotel business; that said furniture, furnishings and equipment was of the reasonable actual value to plaintiff of the sum of $60,000.

That defendant Sutherlin Barry & Company Inc., ever since taking possession and control of said real property and said personal property as aforesaid, has without right or authority exercised the rights of ownership therein and as plaintiff is informed and believes, and therefore alleges, has sold and otherwise disposed of said personal property and the whole thereof without the consent and against the will of plaintiff.

XVII.

That by reason of the said acts of defendants and each of them as aforesaid, plaintiff has been deprived of the use and occupancy of said properties, to-wit, the said Engstrum and Venice real properties, together with her said personal property thereon, and the income therefrom, from and since the said 4th day of June 1926; that said property, and the whole thereof, theretofore were used and utilized by plaintiff and would have continued to be so used by her, in carrying on her apartment house and hotel business; that plaintiff net income therefrom prior to said June 4th, 1926, was, and would have thereafter continued to be, the sum of $50,000 per year; that by reason of said acts of defendants as aforesaid, and the said loss of plaintiff's

said net income therefrom as aforesaid, plaintiff suffered damages in the sum of $125,000.00.

XVIII.

That plaintiff has heretofore demanded of defendants and each of them the return to plaintiff of said real and personal property and the whole thereof, or the value thereof, but defendants and each of them have ever refused and still refuse to return the same or any part thereof, and/or to pay to plaintiff the value or any part of the value thereof.

XIX.

That by reason of the said false and fraudulent promises and representations of defendants and each of them, and by reason of the said failure and refusal of defendants to carry out the said agreements as hereinbefore set forth, and by reason of the carrying out of their said general scheme to deprive plaintiff of her said real property in the manner aforesaid, plaintiff was thereby deprived of all of her interest in said real property as the same existed prior to said July 29th, 1925, all to her damage in the sum of $750,000, less the sum of $300,000 paid thereon by defendant Sutherlin Barry & Company, Inc., in behalf of plaintiff, or the net sum of $450,000; together with the value of plaintiff's said personal property in the sum of $60,000 as aforesaid, and the loss of the revenue from said property and the whole thereof as aforesaid, in the sum of $125,000, or the total sum of $635,000.

WHEREFORE, plaintiff prays judgment against the defendants and each of them in the sum of Six Hundred and Thirty-five Thousand ($635,000) Dollars; for her costs of suit herein, and for such other, further and differ-

ent relief as to the Court may seem meet and equitable in the premises.

Ewell D. Moore
and
D. A. Knapp
Attorneys for Plaintiff.

STATE OF CALIFORNIA, (
(ss.
County of Los Angeles,)

GRACE E. LOW, being by me first duly sworn, deposes and says: that she is the plaintiff in the above entitled action; that she has read the foregoing Complaint and knows the contents thereof; that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

Grace E. Low

Subscribed and sworn to before me this 15 day of November 1928.

[Seal.] Ivan G. McDaniel
Notary Public in and for the County of Los Angeles, State of California.

EXHIBIT "A."

THIS AGREEMENT made and entered into this 22nd day of April, 1925, by and between GRACE E. LOW and CHAS. H. LOW, her husband, Parties of the First Part, hereinafter called the "Owners" and SUTHERLIN, BARRY & COMPANY, INC., a corporation, Party of the Second Part, hereinafter called the "Purchaser."

WITNESSETH: that,

WHEREAS, the parties of the First Part are the Owners in fee simple of that certain property located in the City of Los Angeles, County of Los Angeles, State of California, particularly described as follows, to-wit:

WEly 85 ft. of NWly 150 ft. of Lots 12 and 13 and SWly 32 ft. of SEly 85 ft. of NWly 150 ft. of Lot 14, all in Block 108 of the Bellevue Terrace Tract as per Book 2, Page 585 of Miscellaneous Records of said Los Angeles County, excluding therefrom streets if any, subject to all easements, restrictions, reservations and servitudes, if any of record. Said premises being known as the Engstrum Arms Apartment Hotel, 623 West Fifth Street, in said City of Los Angeles.

together with improvements thereon consisting of a six-story and full basement "Class A" reinforced concrete apartment hotel having 212 rooms sub-divided as follows:

Twelve (12) double apartments consisting of living room and dining room, each equipped with double disappearing beds, kitchen and bath; 75 single apartments, each consisting of combination living and dining room containing one double disappearing bed, kitchen, and bath, and seven (7) transient hotel rooms.

In addition, the building contains a large ballroom on the Seventh Floor, store rooms and two (2) very large rooms in the basement suitable for commercial purposes which the Owners expect to rent at an income of Seven Thousand Dollars ($7,000.00) per year, when, and if, a tunnel is constructed leading from the basement of said building to "Lower" Fifth Street, plans for which have been made.

Said building is equipped with a modern steam heating system and is in first class condition throughout, except that it needs certain minor repairs and other improvements such as painting the outside of the building and some inside redecorations which are necessary to bring the building and appearances back to first class condition, and

WHEREAS, the Owners believe and expect that the future operation of said apartment hotel building will conservatively yield net earnings of at least Sixty Thousand Dollars ($60,000.00) a year, and

WHEREAS, the Owners propose and intend to create a bonded indebtedness in the aggregate principal amount of Two Hundred Ninety-five Thousand Dollars ($295,000.00) to be represented by their individual bonds secured by a mortgage or trust deed upon said property, the net proceeds to be derived therefrom to be used for the purpose of paying existing indebtedness against said property and for such other purposes as are hereinafter recited, and

WHEREAS, the Purchaser desires to purchase all of said bonds upon the terms and conditions hereinafter specified.

NOW THEREFORE, in consideration of the premises and the sum of Ten Dollars ($10.00) to each of the parties hereto in hand paid by the other, receipt whereof is hereby acknowledged, and the mutual covenants, promises and agreements herein contained, it is hereby agreed by and between the parties hereto as follows, to-wit:

First: The owners agree to immediately proceed to create and issue their individual First Mortgage Seven Per Cent Sinking Fund Gold Bonds of the aggregate par or face value of $295,000.00, all of said bonds to be dated

as of the 15th day of May, 1925; to be in denominations satisfactory to the Purchaser and to bear interest at the rate of 7% per annum, payable semi-annually, and the principal of said bonds shall become due and payable as follows:

$10,000.00 on the 15th day of May in the years 1927, 1928, 1929 and 1930;

$15,000.00 on the 15th day of May in the years 1931, to 1939, both inclusive, and

$120,000.00 on the 15th day of May, 1940.

Second: The Owners agree to sell to the Purchaser and the Purchaser agrees to buy all of said bonds of the aggregate par or face value of $295,000.00, when the same have been duly issued by the Owners and are ready for delivery, as herein provided, and the Purchaser agrees to pay to the Owners therefor 90% of the par or face value of said bonds plus accrued interest to the date of delivery.

Third: It is agreed that all of said bonds shall be secured by a first mortgage or deed of trust upon all of the property hereinbefore particularly described; that they shall be in such denominations as the Purchaser may desire and that said mortgage or trust deed securing the same shall contain the following terms and conditions:

(a) That the interest on said bonds shall be due and payable on the 15th day of May and the 15th day of November in each year; principal and interest payable at the main office of Citizens Trust & Savings Bank, in the City of Los Angeles, State of California, which shall be the Trustee under said mortgage or deed of trust.

(b) Said bonds shall be called First Mortgage Seven Per Cent Serial Gold Bonds and a sinking fund shall be provided for by said mortgage or deed of trust in such a

manner that the Owners shall be required to make payment to the Trustee in lawful money of the United States, as and for such sinking fund, commencing on the first day of June, 1925, and continuing on the first day of each and every month therefater until all of the principal and interest of said bonds shall have been paid in full, a sum equal to one-twelfth (1/12) of the annual requirements for the payment of principal and interest on said bonds, and the Owners agree that the full amount necessary to meet any semi-annual installment of interest and the amount necessary to make payment of any of the principal of said bonds, shall be deposited with the Trustee not less than fifteen (15) days prior to the date upon which the same shall become due under the terms of said mortgage or deed of trust, and all such payments made to the Trustee shall bear interest at the rate of 2% per annum.

(c) All or any of said bonds may be redeemed on any interest payment date during the first five (5) years at 105% of the par value thereof plus accrued interest; during the second five years at 103½% of the par value thereof plus accrued interest, and thereafter at 102% of the par value thereof plus accrued interest, upon sixty (60) days notice to the Trustee in advance of the date fixed for such redemption, provided that all bonds shall be redeemed in their inverse numerical order, that is, the longest maturities first. The Owners also have the right to purchase bonds on the open market, at a price not exceeding the then redemption price, and for that purpose to use any sinking fund moneys available.

(d) The Owners shall, at all times, maintain fire and earthquake insurance in a reputable fire insurance company or companies, upon the property covered by said

mortgage or deed of trust, in an amount at least equal to the aggregate face amount of said bonds outstanding in case of fire, and in an amount equal to at least 50% thereof in the case of earthquake, all such policies to contain standard New York loss payable clauses and the Owners further agree to carry boiler insurance in the sum of *$50,000,00,* public liability insurance in a like amount, and rental insurance for the full insurable rental value, at all times during which any of said bonds are issued and outstanding.

(e) The Owners shall pay both principal and interest of said bonds without deduction for any tax or taxes, assessments or other governmental charges which the Owners, or the Trustee may be required or permitted to pay thereon, or to retain therefrom, under any present or future law of the United States, or of any state, county, municipality or other governmental subdivision therein, not exceeding, however, in the case of Federal or other income taxes an aggregate of two per centum (2%) of the interest upon the principal of said bonds.

Fourth: It is further understood and agreed that the net proceeds derived from the sale of said bonds shall be used, first, for the purpose of paying in full the existing indebtedness against said property, and second, for the purpose of making those minor repairs and improvements hereinbefore mentioned, such as painting the outside of the building and re-decorating the interior so as to bring the appearances of the building back to first class condition, the balance to be delivered to the Owners.

Fifth: The mortgage and deed of trust securing said bonds shall be a first lien upon all of said property, excepting easements, rights of way of record and taxes due but

not delinquent, and the owners agree to furnish to the Purchaser a guarantee of title insurance in the sum of $295,000.00, to be issued by a title company satisfactory to the Purchaser and showing said property to be vested in the Trustee, free and clear of all incumbrances, excepting easements and rights-of-way of record and taxes due but not delinquent.

Sixth: It is understood and agreed that the Owners shall do all within their power to secure the permit from the State Corporation Commissioner authorizing said bonds to be issued and sold and also the Certificate of the Superintendent of Banks of the State of California, certifying said bonds as legal for savings banks in said state, bur should they fail in securing either said permit or said certification, without any fault upon their part, neither of said First Parties shall be held liable for any costs or damages resulting therefrom or from their failure to issue and deliver said bonds as herein agreed upon.

Seventh: The Owners agree to furnish to the Purchaser, upon the execution hereof, a certified statement showing the gross income and expense in the operating of said property for the year ending April 18th, 1925, which statement shall correctly show net income in excess of two and one half times the interest requirements on said proposed bonds, and it is further agreed that all special assessments levied, or which may be levied upon said property by City, County, State or Federal authorities, shall be paid in cash and not permitted to go to bond.

Eighth: It is mutually understood and agreed that the purchase of said bonds by the Purchaser shall depend upon the following, the failure of any one of which shall relieve and release the Purchaser of and from any obligations

upon its part to purchase said bonds as herein provided, viz:

(1) The said mortgage or deed of trust securing said bonds shall, in addition to those herein specified, contain the usual terms, covenants and conditions of mortgages and deeds of trust securing bonds of the kind and character herein provided, and any special provisions mutually agreed upon by the Owners and Purchasers.

(2) The issuance of a permit by the Commissioner of Corporations of the State of California, authorizing the owners to issue and sell their said bonds at the price and upon the terms herein provided.

(3) All proceedings in the creation of said bonds shall be subject to the approval of Messrs. Gibson, Dunn & Crutcher, whose approval of the legality of said issue of bonds and of their form and of the form of said mortgage or deed of trust securing the same, shall first be secured.

It is understood and agreed that the Purchaser shall be under no obligation to purchase said bonds as herein provided unless the Owners shall secure an appraisement from an appraiser approved by the State Corporation Commissioner showing the property securing said bonds to be of the value of at least $500,000.00, and if the Owners are unable to secure such appraisement they shall not be held liable hereunder in damages or for the delivery of said bonds, but in such event this contract shall be of no force or effect.

Ninth: In the event said bonds are issued and sold as contemplated herein the Owners will pay the cost of (1) engraving said bonds, (2) guarantee of title, (3) recording said Trustee's fee, (4) Notary, escrow and attorney's fees, (5) fees of the Corporation Commissioner and State

Superintendent of Banks, and (6) fees for appraising said property.

Tenth: When the guarantee of title shall have been issued and the mortgage or deed of trust securing said bonds shall have been recorded, and all matters in connection with the issuance of said bonds completed, the Purchaser agrees to place on deposit with said Trustee, a sum of money equal to 90% of the par or face value of said bonds, plus accrued interest to the date of delivery, in cash, lawful money of the United States, and the Trustee shall disburse the same in accordance with the terms hereof.

IN WITNESS WHEREOF, the parties of the First Part have hereunto set their hands and the party of the second part has signed its corporate name and affixed its corporate seal hereto by its officers thereunto duly authorized, the day and year first hereinabove written.

GRACE E. LOW
CHAS. H. LOW
Parties of the First Part

SUTHERLIN, BARRY & COMPANY, INC.,
By JNO E SUTHERLIN
President

By.....
Secretary.

EXHIBIT "B"

Los Angeles, California, June 29, 1925.

Messrs. Sutherlin, Barry & Company, Inc.,
339 Carondelet Street,
New Orleans, Louisiana.

Gentlemen:—

Supplementing the contract entered into with you to-day for the sale of $360,000.00 First Mortgage Bonds to you at the price of 90 and interest, beg to advise that the said

price of 90 and interest is intended to be the net cost of said bonds to you other than the bill for appraisals fee which you have paid.

In recognition of the commission due Messrs. S. E. Campbell & Company and Messrs. Lindsay, Willard & Lowe by you by reason of the original contract existing between us, I hereby agree to pay you the sum of Five Thousand Nine Hundred ($5,900.00) Dollars concurrently with the delivery of the bonds to you, and you are hereby authorized to deduct the said Five Thousand Nine Hundred ($5,900.00) Dollars from the proceeds of said bond issue at the time of payment, and this order shall be recognized by the Trustee at the time the bonds are delivered to you.

Very truly yours,

GRACE E. LOW

GEL:MB

EXHIBIT "C"

Messrs. Sutherlin, Barry & Company, Inc.,
339 Carondelet Street
New Orleans, Louisiana.

Gentlemen:—

The undersigned owns in fee that certain property located at 623 West Fifth Street in the City of Los Angeles, California, particularly described as follows:

WEly 85 ft. of NWly 150 ft. of Lots 12 and 13 and SWly 32 ft. of SEly 85 ft. of NWly 150 ft. of Lot 14, all in Block 108 of the Bellevue Terrace Tract as per Book 2, Page 585 of Miscellaneous Records of said Los Angeles County, excluding there from streets if any, subject to all easements restrictions, reservations and servitudes, if any

of record. Said premises being known as the Engstrum Arms Apartment Hotel, 623 West Fifth Street, in said City of Los Angeles.

Together with improvements thereon consisting of a six-story and full basement, Class "A" reinforced concrete apartment hotel in good repair, having 212 rooms subdibided as follows:

Twelve (12) double apartments consisting of living room and dining room, each equipped with double disappearing beds, kitchen and bath; Seventy-Five (75) single apartments consisting of combination living and dining room containing one double disappearing bed, kitchen and bath; and Seven (7) transient hotel rooms.

In addition thereto, the building contains a large ballroom located on the seventh floor; several store rooms and two very large rooms in the basement suitable for commercial purposes.

The said building is equipped with a modern steam heating system and is in first class condition throughout, except that it needs certain minor repairs and other improvements such as painting the outside of the building, and some inside redecorations, all of which can be accomplished in a first class manner at an expense not to exceed Fifteen Thousand ($15,000.00) Dollars.

The undersigned likewise owns in fee that certain property located in the City of Venice, Los Angeles County, California, known as "United States Island," being Lots "P" and "R" recorded in Book 6, Page 125, Records of Los Angeles County, California, which property consists of approximately three acres of land, and on which are located twenty seven (27) single cottages, three (3) double cottages, one (1) store and a garage of fourteen (14)

stalls, all being of frame construction and in good state of repair.

For the purpose of funding and consolidating my several items of indebtedness, consisting of various mortgages on each of the above mentioned properties, unsecured notes, etc., I desire to issue and sell First Mortgage 7% Bonds in the aggregate principal sum of Three Hundred and Sixty Thousand ($360,000) Dollars to be secured by each of the above mentioned properties, and hereby offer you the said bonds at the price of Ninety (90) and accrued interest, making the following representations and guarantees:

First: Said bonds shall be dated on or about August 1, 1925, and mature serially as follows:

$12,000 Aug. 1, 1927	$21,000 Aug. 1, 1934
14,000 Aug. 1, 1928	23,000 Aug. 1, 1935
15,000 Aug. 1, 1929	25,000 Aug. 1, 1936
16,000 Aug. 1, 1930	26,000 Aug. 1, 1937
17,000 Aug. 1, 1931	28,000 Aug. 1, 1938
18,000 Aug. 1, 1932	30,000 Aug. 1, 1939
20,000 Aug. 1, 1933	95,000 Aug. 1, 1940

Interest on these bonds is to be payable semi-annually, and both principal and interest shall be payable at the office of the Trustee which shall be the Citizens Trust & Savings Bank, Los Angeles, California, or at the office of the Trustee should some other bank be so designated. The bonds shall be issued in such denominations as you may desire, and bear interest at the rate of seven per centum (7%) per annum. The said bonds shall be redeemable on any interest date upon sixty (60) days notice to the Trustee at 105 and accrued interest during the years 1926 to 1930 inclusive; at 104 and accrued interest

during the years 1931 to 1935 inclusive; and 102 and accrued interest thereafter, but any bonds called for redemption shall be of the longest maturities in their inverse numerical order. The undersigned shall have the right to purchase bonds in the open market at a price not exceeding the then redemption price and, for that purpose, may use any sinking fund moneys available.

Second: Said bonds to be secured by closed first mortgage upon all the property herein described, but the Trust Indenture shall provide that the mortgage upon the Venice property may be released from said mortgage and/or Deed of Trust upon payment to the Trustee of the sum of Seventy Thousand ($70,000) Dollars for the redemption of as many of said bonds as Seventy Thousand ($70,000) Dollars will redeem at the then redemption price.

Third: You have heretofore been furnished with detailed appraisals on the Engstrum Arms Apartment Hotel by the Fidelity Appraisal Company and by James W. Long, Appraiser for the Corporation Commission, and appraisal on the Island property by James W. Long, both of said appraisals by Mr. Long having been accepted by the Corporation Commission. I will furnish you, at my expense, with a detailed appraisal by the Fidelity Appraisal Company of the Venice property and you are hereby authorized to contract for such appraisal, such fees or charges to be paid by me and deducted from the proceeds of the bond issue.

Fourth: I agree that I will promptly make applications to the Superintendent of Banks of the State of California, for his certificate, certifying said bonds as legal for investment Savings Banks in California and to pay the costs

therefor but the securing of such certificate shall not be obligatory; also to do all things necessary to secure the permit of the State Corporation Commission authorizing the issuance of these bonds.

Fifth: I further agree, that, prior to the payment by you of or concurrently with the delivery of the bond issue to you to deliver your bondholders policies of title insurance issued by the Title Insurance & Trust Company of Los Angeles in the sum of Fifty Thousand ($50,000.00) Dollars on the Venice property and Three Hundred Thousand ($300,000.00) Dollars on the Engstrum property.

Sixth: I further agree that all special assessments levied or which may be levied upon either of said properties by City, County, State of Federal authorities, during the life of this bond issue, shall be paid in cash and not permitted to go to bond or otherwise which would become a prior lien or obligation to this bond issue.

Seventh: The Mortgage and/or Deed of Trust covering such bonds shall, in addition to these herein specified, contain the usual terms, covenants and conditions of Mortgage and/or Deeds of Trust securing the bonds of the kind and character herein provided, and any special provisions mutually agreed upon. The said Mortgage and/or Deed of Trust shall provide that the borrower shall be required to make payment to the Trustee in lawful money of the United States on the 15th day of August 1925, and on the 15th day of each and every succeeding month while all or any part of the bonds are outstanding as and for a sinking fund for the redemption of said bonds and the interest maturing thereon; said monthly payments to be in a sum equal to one-twelfth (1/12) of the annual requirement for payment of principal and interest on said

bonds; and that the full amount necessary to meet any installments of interest and the necessary amount to make payment of any of the principal of said bonds shall be deposited with the Trustee not less than fifteen (15) days prior to the date upon which same shall become due under the terms of said Mortgage and/or Deed of Trust.

Eighth: The said Mortgage and/or Deed of Trust shall provide that the borrower shall, at all times, during the life of this bond issue, maintain various forms of insurance for the benefit of the bondholders on each of said properties as follows:

ENGSTRUM ARMS APARTMENT HOTEL

(a) Fire insurance in a net amount of $290,000, or in proportion thereto, as the bonds are retired;

(b) Earthquake insurance in an amount equal to, at least, 50% of the amount of the bonds outstanding;

(c) Boiler insurance in the sum of $50,000; Public Liability Insurance in the sum of $50,000;

(d) Workmen's Compensation or Employers' Liability Insurance for an amount fixed by law, but in no case less than $25,000; and

(e) Rental insurance for the full insurable rental value.

VENICE PROPERTIES

(a) Fire Insurance in a net amount of $70,000, or in proportion thereto, as the bonds are retired;

(b) Earthquake insurance in an amount equal to, at least, 50% of the amount of the insurable value;

(c) Workmen's Compensation or Employers Liability Insurance for an amount fixed by law; and

(d) Rental insurance for the full insurable rental value.

All Fire and Earthquake Insurance to Carry Standard New York Loss Payable Clauses; and all policies of insurance shall be delivered to the Trustee prior to or concurrently with the delivery of these bonds. Furthermore, all insurance shall be written with Companies of your selection and through Agents or Brokers whom you may designate.

Ninth: The said bond issue shall be payable both as to principal and interest without deduction for any tax or taxes, assessments or other governmental charges which the owner or the trustee may be required or permitted to pay thereon, or to retain therefrom, under any present or future law of the United States, or of any state, county, municipality, or other governmental subdivision therein, not exceeding, however, in the case of Federal or other income taxes an aggregate of two per centum (2%) of the interest upon the principal of said bonds.

Tenth: The Mortgage and/or Deed of Trust securing said bonds shall be a first lien upon all such property, excepting easements, rights of way of record and taxes due but not delinquent.

Eleventh: The income from each of these properties has been as follows:

Engstrum Arms Apartment Hotel

Average gross monthly income for the past eighteen months $6,500.00
Net 5,000.00

Venice Properties

Gross income for the past 31 months..... 965.00 per month
Net ..... 725.00 "

Twelfth: All proceedings in the creation of said bonds shall be conducted by Messrs. O'Melveny, Millikin, Tuller

& Macneil, Attorneys of Los Angeles, California, whose approval of the legality of said bond issue, and the form of said Mortgage and/or Deed of Trust securing the same, shall be secured at my expense before you shall be required to accept delivery of said bonds.

Thirteenth: I agree to furnish suitable lithographed bonds and guaranty of title at my expense, and to pay recording and attorneys' fees, notary, escrow fees, fees of the Corporation Commission and State Superintendent of Banks and fees for appraising said property, except appraisal fees previously paid by you, together with all other usual and customary expenses in a bond issue of this character.

Fourteenth: All secured interest received at time bonds are delivered to you shall be deposited with Trustee to credit of Interest Account for payment of interest on said bonds.

Time is the essence of this contract and I agree to deliver said bonds to you not later than September 15th, 1925.

Agreement heretofore entered into is hereby cancelled by mutual consent.

GRACE E. LOW

Accepted June 29, 1925
SUTHERLIN, BARRY & COMPANY INC.,
By JNO E SUTHERLIN
President.

EXHIBIT "D"

THIS INDENTURE made and entered into as of the 1st day of August, 1925, by and between GRACE E. LOW, residing at #271 South New Hampshire Street,

City of Los Angeles, County of Los Angeles, State of California (being hereinafter sometimes called the "Trustor") party of the first part, and CITIZENS TRUST AND SAVINGS BANK, a corporation organized and existing under the laws of the State of California, for the purpose among other things of holding and administering property in trust and having its office and principal place of business in the City of Los Angeles, County of Los Angeles, State of California (hereinafter called the "Trustee") party of the second part,

WITNESSETH:

WHEREAS, the Trustor desires that there be issued the bonds hereinafter mentioned aggregating Three hundred sixty thousand dollars ($360,000) principal amount; designated as GRACE E. LOW PROPERTIES FIRST MORTGAGE SEVEN PER CENT SERIAL GOLD BONDS; that said bonds be of the number, denominations and maturities hereinafter set forth; that said bonds bear interest at the rate of seven percent (7%) per annum, payable semi-annually on the first days of February and August each year until paid; that both principal and interest be payable in gold coin of the United States of America of or equivalent to the present standard of weight and fineness; that the principal of and the interest on said bonds be payable at the main office of Citizens Trust and Savings Bank in the City of Los Angeles, County of Los Angeles, State of California, or at the main office of Canal Commercial Trust & Savings Bank in the City of New Orleans, State of Louisiana, at the option of the holders thereof; that all or any part of said bonds be subject to redemption, upon sixty (60) days' notice, upon any semi-annual interest payment date upon and by the

payment of the principal thereof and the interest due thereon, together with a premium of five per cent (5%) upon the principal thereof if such redemption be effected on or before August 1, 1930; a premium of four per cent (4%) upon such principal if such redemption be effected thereafter and on or before August 1, 1935, and a premium of two per cent (2%) upon such principal if such redemption be effected after August 1, 1935, and prior to maturity; that said bonds be issued, received and held subject to all and singular the terms of this indenture; and that said bonds and the coupons and trustee's certificate be subs*n*tantially in the following form, to-wit:

(Form of Bond)

UNITED STATES OF AMERICA
STATE OF CALIFORNIA.

No..... $.....

GRACE E. LOW PROPERTIES

First Mortgage Seven Per Cent Serial Gold Bond.

For Value Received Grace E. Low hereby promises to pay to the bearer hereof.....Dollars ($.....) in gold coin of the United States of America of or equivalent to the present standard of weight and fineness, on the first day of August, 19....., together with interest thereon from the date hereof at the rate of seven per cent (7%) per annum, payable semi-annually in like gold coin on the first days of February and August of each year, in accordance with and on presentation and surrender of the interest coupons hereto attached as they severally become due. The principal hereof and the interest hereon is payable at the main office of Citizens Trust and Savings Bank, in the City of Los Angeles, State of California, or at the

main office of Canal Commercial Trust & Savings Bank, in the City of New Orleans, State of Louisiana, at the option of the holder. The principal hereof and the interest hereon are payable without deduction for any tax or taxes, assessments or other governmental charges which said Citizens Trust and Savings Bank, said Canal Commercial Trust & Savings Bank, or said Grace E. Low may be required or permitted to pay thereon or to retain or deduct therefrom under any present or future law or ordinance of the United States or of any state, county, municipality or other lawful taxing authority therein, not exceeding, however, in the case of federal or other income taxes an aggregate of two per cent (2%) of the interest upon said principal, and said Grace E. Low agrees to reimburse the holder of this bond, or of the coupons hereto attached, upon written demand being made on said Grace E. Low, or upon said Citizens Trust and Savings Bank or said Canal Commercial Trust & Savings Bank, as her agents, for any such taxes, assessments or charges which said holder may be required to pay unless and until said Grace E. Low, said Citizens Trust & Savings Bank or said Canal Commercial Trust & Savings Bank shall be required or permitted to pay, retain or deduct such taxes, assessments or charges.

This bond is one of a series of four hundred and one (401) First Mortgage Seven Per Cent Serial Gold Bonds, all of like date and tenor except the variations necessary to express their numbers, denominations and maturities, Bonds numbered M-1 to M-319 both inclusive, are of the denomination of One thousand dollars ($1,000) each and bonds numbered D-1 to D-82, both inclusive, are of the denomination of Five hundred dollars ($500) each. Said

bonds are due and payable serially on the first day of August of the following years, as follows: Bonds numbered M-1 to M-10, 1927; M-11 to M-21, 1928; M-22 to M-33, 1929; M-34 to M-46, 1930; M-47 to M-60, 1931; M-61 to M-75, 1932; D-1 to D-32, 1933; M-76 to M-91 1934; M-92 to M-108, 1935; M-109 to M-126, 1936; M-127 to M-145, 1937; M-146 to M-166, 1938; m-167 to M-189, 1939; M-190 to M-319, 1940; and D-33 to D-82, 1940. All of said bond numbers are inclusive.

All of said bonds are issued or are to be issued under and equally secured by and are subject to the terms and conditions of a mortgage or deed of trust of even date herewith executed and delivered by Grace E. Low to Citizens Trust and Savings Bank, as Trustee, to which mortgage or deed of trust reference is hereby made for a description of the property mortgaged, the nature and extent of the security and the rights of the holders of said bonds under the same and the terms and conditions under which said bonds are issued.

In case an event of default as defined in said mortgage or deed of trust shall occur, the principal of all of said bonds, including this, may become or be declared due and payable in the manner and with the effect provided in said mortgage or deed of trust. All or any part of said bonds may be redeemed and paid upon any interest payment date before maturity of the same, at the Main Office of Citizens Trust and Savings Bank in the City of Los Angeles upon and by the payment of the principal thereof and the interest due thereon, together with a premium of five per cent (5%) upon the principal thereof, if such redemption *ve* effected on or before August 1, 1930; a premium of four per cent (4%) upon such principal if such redemp-

tion be effected thereafter and on or before August 1, 1935; and a premium of two per cent (2%) upon such principal if such redemption be effected after August 1, 1935 and prior to maturity. Such payment and redemption of said bonds shall be accomplished in the manner set forth in said mortgage or deed of trust, and in case the total issue of bonds secured by said mortgage or deed of trust is not called for redemption at any one time then the bonds of the longest maturity at the time outstanding shall be redeemed first and in effecting such redemption call shall be made for bonds in their inverse numerical order.

This bond shall not become valid or obligatory unless and until it shall have been authenticated by the certificate of the Trustee under said mortgage or deed of trust endorsed hereon.

IN WITNESS WHEREOF, GRACE E. LOW, at Los Angeles, California, has hereunto set her hand and seal and has caused the hereunto attached coupons to be authenticated by the facsimile of her signature thereon, as of the 1st day of August, 1925.

.....

(Form of Interest Coupon)

No..... $.....

On the first day of....., 19....., unless the bond hereinafter mentioned shall have been called for earlier redemption, on surrender of this coupon, Grace E. Low promises to pay to bearer at the Main office of Citizens Trust and Savings Bank, Los Angeles, California, or at the option of the holder, at the Main Office of Canal Commercial Trust & Savings Bank, in the City of New Orleans, State of Louisiana, ...Dollars

($.....) in gold coin of the United States without deduction for taxes except as specified in the bond hereinafter mentioned, being six (6) months' interest then due on Grace E. Low Properties First Mortgage Seven Per Cent Serial Bold Bond No.....

TRUSTEE'S CERTIFICATE

This is to certify that this bond is one of the bonds described in the within mentioned mortgage or deed of trust dated August 1, 1925, and executed by Grace E. Low, to the undersigned as Trustee.

CITIZENS TRUST AND SAVINGS BANK

By

.....

Assistant Trust Officer.

AND WHEREAS, the Commissioner of Corporations of the State of California has issued his permit authorizing the issuance and sale of each of said bonds, and all the prerequisite steps and proceedings, acts and things essential to the proper, due and legal authorization of said bonds and of this indenture have been taken by the proper bodies, boards, officers and persons and in due and in proper form, time and manner;

NOW, THEREFORE, THIS INDENTURE WITNESSETH:

That in order to secure the payment of the principal and interest of all of the bonds at any time issued and outstanding under this indenture, according to their tenor, purport and effect, and to secure the performance and observance of all the covenants, agreements and conditions herein contained, and to declare the terms and conditions upon which said bonds are issued, received and held, and for and in consideration of the premises and of the pur-

chase and acceptance of said bonds by the holders thereof and of the sum of ten dollars ($10.00) in hand duly paid to the Trustor by the Trustee upon the execution and delivery of these presents, the receipt of which is hereby acknowledged, GRACE E. LOW, party of the first part hereto, has granted, bargained, sold, assigned, transferred, conveyed, confirmed, mortgaged, pledged and hypothecated, and by these presents does grant, bargain, sell, *sell*, assign, transfer, convey, confirm, mortgage, pledge and hypothecate unto CITIZENS TRUST AND SAVINGS BANK, the party of the second part hereto, as Trustee, and to its several successors in the trust hereby created, those certain parcels of real property situated in the County of Los Angeles, State of California, described as follows, to-wit:

PARCEL 1. "Engstrum Apartment Property."

That portion of Lots 12, 13 and 14 in Block 108 of Bellevue Terrace Tract, in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in Book 2, Page 585, Miscellaneous Records of said County, described as follows:

Beginning at a point in the Northerly line of Fifth Street, distant 65 feet Easterly from its intersection with the Easterly line of Hope Street; thence Easterly along said line of Fifth Street, 85 feet to its intersection with the Westerly line of a 12 foot alley (so called); thence along said Westerly line, Northerly and parallel with the Easterly line of said Lots 12, 13 and 14, 142 feet; thence Westerly parallel with the Northerly line of Fifth Street, 85 feet; thence Southerly 142 feet to the point of beginning.

PARCEL 2. "Venice Properties."

Lots "P" and "R" of Venice of America, in the City of Venice, County of Los Angeles, State of California, as per map recorded in Book 6, Pages 126 and 127 of Maps, in the office of the County Recorder of said County.

TOGETHER with any and all buildings, improvements and appurtenances now standing, or at any time hereafter constructed or placed upon said land or any part thereof, including wall beds all screens, steam heating, plumbing ventilating gas and electric light fixtures, elevators and fittings, and machinery, appliances, apparatus and fittings and fixtures of every kind in any building or buildings now or hereafter standing on said premises, or any part thereof, and the reversion and reversions, remainder and remainders, in and to said premises, and each and every part thereof, and together with all the rents, issues and profits thereof (which are specifically assigned), and together with all and singular the tenements, hereditaments, easements, appurtenances and appendages to said estate, and property belonging or in any wise appertaining, and all the estate, right, title, interest, claim or demand whatsoever of the Trustor, either in law or in equity, either in possession or expectancy of, in and to the above described land and estate.

TO HAVE AND TO HOLD, all and singular, the said premises and properties, and also any and all additional premises and properties that by virtue of any provision hereof or by any indenture supplemental hereto hereafter shall become subject to this indenture, to the Trustee, its successors and assigns, forever.

BUT IN TRUST, NEVERTHELESS, under and subject to the provisions and conditions hereinafter set forth, for the equal and proportionate security of all present and

future holders of the bonds and coupons issued and to be issued hereunder, and to secure the payment of such bonds and coupons and to secure the performance and observance of and compliance with each and all of the covenants and conditions of this indenture, without preference, priority or distinction as to lien or otherwise of any one bond or coupon over any other bond or coupon by reason of priority in the issue, sale or negotiation thereof, or by reason of any other cause; so that every bond and coupon issued hereunder shall have the same right, lien and privilege under and by virtue of his indenture, and so that the principal and interest of every such bond subject to the terms hereof, shall be equally and proportionately secured hereby as if all had been duly issued, sold or negotiated simultaneously with the execution and delivery of this indenture; it being intended that the lien and security of this indenture shall take effect upon the date of the execution and delivery hereof without regard to the time of actual issue, sale or negotiaiton of said bonds, and as though upon such date all such bonds were actually issued, sold and delivered to and were in the hands of the holders thereof for value.

AND IT IS HEREBY COVENATED AND DECLARED, that all the bonds secured hereby and the coupons thereon are to be issued, certified and delivered, and that the trust estate is to be held by the Trustee subject to the covenants, conditions, uses and trusts hereinafter set forth as follows, to-wit:

ARTICLE I.

EXECUTION, MATURITY, FORM OF BONDS

Section 1. The bonds issued hereunder, together with interest coupons appertaining thereto, and the Trustee's certificate endorsed thereon, shall be substantially in the

form and of the tenor and purport hereinbefore recited and shall be known as the Grace E. Low Properties First Mortgage Seven Per Cent Serial Gold Bonds.

Section 2. The aggregate principal sum of all bonds which may be issued and outstanding under and secured by this indenture shall at no time exceed the sum of Three hundred sixty thousand dollars ($360,000). Said bonds shall be Four hundred and one (401) in number and all of like date and tenor except the variations necessary to express their numbers, denominations and maturities. Bonds numbered M-1 to M-319, both inclusive, are of the denomination of One thousand dollars ($1,000) each and bonds numbered D-1 to D-82, both inclusive, are of the denomination of Five hundred dollars ($500) each. Said bonds are due and payable serially on the first day of August of the following years, as follows: Bonds numbered M-1 to M-10, 1927; M-11 to M-21, 1928; M-22 to M-33, 1929; M-34 to M-46, 1930; M-47 to M-60, 1931; M-61 to M-75, 1932; D-1 to D-32, 1933; M-76 to M-91, 1934; M-92 to M-108, 1935; M-109 to M-126, 1936; M-127 to M-145, 1937; M-146 to M-166, 1938; M-167 to M-189, 1939, M-190 to M-319, 1940; and D-33 to D-82, 1940. All of said bond numbers are inclusive.

Section 3. On each of said bonds there shall be the proper number of interest coupons of the face value of Thirty-five dollars ($35.) each in the case of bonds of the denominations of One thousand Dollars ($1,000) and of the face value of Seventeen dollars and fifty cents ($17.50) each in the case of bonds of the denomination of Five hundred dollars ($500). The first of said coupons shall be payable on February 1, 1926, and shall represent interest to that date from August 1st, 1925, and each suc-

cessive coupon shall be payable six (6) months after the date on which the preceding coupon is expressed to be payable and shall represent interest for the preceding six (6) months.

Section 4. The bonds shall pass by delivery.

Section 5. The Trustor and the Trustee may deem and treat the bearer of any bond and the bearer of any coupon for interest accruing on any bond, as the absolute owner of said bond or coupon for the purpose of receiving payment thereof, and for all other purposes whatsoever, whether said bond or coupon be overdue or not, and neither the Trustor nor the Trustee shall be affected by any notice to the contrary.

Section 6. In case any bond issued hereunder or the coupons thereto appertaining shall be mutilated, lost or destroyed, the Trustor in her discretion may execute, and thereupon the Trustee shall certify and deliver, a new bond and coupons of like tenor, date, serial number, amount and maturity, in exchange for and upon cancellation of the mutilated bond or coupons or in substitution for the bond or coupons so destroyed or lost. The applicant for such *si*bst*u*tuted bond or coupons shall furnish to the Trustor and the Trustee evidence of the destruction or loss of such outstanding bond or coupons, and of his ownership thereof, which evidence shall be satisfactory to her and the Trustee, in exercise of their absolute discretion, and said applicant shall also furnish indemnity satisfactory to them, in the exercise of like discretion. Such applicant also shall pay all necessary expenses incurred by the Trustor in making and issuing such *si*bst*u*tuted bond or coupon or coupons and also all expenses incurred by the Trustee in relation thereto.

Section 7. Said bonds shall be executed by the Trustor and shall then be delivered to the Trustee for certification, and the Trustee thereupon shall certify and deliver said bonds as hereinafter in Article II provided. The coupons of said bonds shall be signed by the facsimile signature of the Trustor.

Section 8. The principal of and the interest on all of said bonds issued hereunder shall be payable at the main office of Citizens Trust and Savings Bank, in the City of Los Angeles, County of Los Angeles, State of California, or at the main office of Canal Commercial Trust & Savings Bank, in the City of New Orleans, State of Louisiana, at the option of the holder, and the Trustor shall make all arrangements and perform all acts necessary to make the bonds so payable.

In the event, however, that said bonds or any thereof shall be called for redemption they shall be payable on the redemption date only at the main office of Citizens Trust and Savings Bank as in Article V. provided.

ARTICLE II.
CERTIFICATION AND ISSUANCE.

Section 1. Only such bonds as shall bear thereon a certificate in substantially the form hereinbefore recited, executed by the Trustee, shall be secured by this indenture, or shall be entitled to any lien, right or benefit hereunder, and no such bonds nor any coupon appertaining thereto shall be valid for any purpose until such certificate on such bond shall have been executed by the Trustee, and such certificate of the Trustee upon any such bond shall be conclusive evidence, and the only evidence, that the bond so authenticated, or its coupons, has been duly issued hereunder, and that the holder is entitled to the benefit of the

trust hereby created. The Trustee shall not certify any bond after its date of maturity.

Section 2. The amount of bonds secured hereby which may be executed by the Trustor and which may be certified by the Trustee is limited, so that never at any time shall there have been executed and certified bonds secured hereby for an aggregate principal sum exceeding Three Hundred Sixty Thousand Dollars ($360,000.00), exclusive of bonds executed and certified in exchange for or in substitution of bonds mutilated, lost or destroyed, as in Section 6 of Article i provided.

Section 3. Upon the execution and recording of this indenture, all of the bonds to be certified and issued hereunder shall by the Trustee be certified and delivered forthwith upon the order of the Trustor.

Section 4. Before certifying or delivering any bonds, all matured coupons thereon shall be cut off and cancelled by the Trustee.

Section 5. The Trustee shall not be required to certify or deliver any bonds hereunder when the Trustor is, to the knowledge of the Trustee, in default with respect to any covenant, condition or agreement in this indenture contained, whether said default shall constitute an event of default as hereinafter defined or not.

Section 6. All bonds whenever issued and for whatever purpose are equally secured by and are entitled to the benefits of the trusts created in this indenture, without priority of one over another.

ARTICLE III.
PARTICULAR COVENANTS.

Section 1. The Trustor covenants and agrees that she will duly and punctually pay or cause to be paid the prin-

cipal and interest of every bond issued hereunder at the times and places and in the manner mentioned in said bonds and in the coupons thereto belonging respectively, according to the true intent and meaning thereof, and of these presents, without deduction for any tax or taxes, assessments or other governmental charges which the Trustor or the Trustee or other paying agent may be required or permitted to pay thereon or to retain or deduct therefrom under any present or future law or ordinance of the United States or of any state, county, municipality or other lawful taxing authority therein, not exceeding, however, in the case of federal or other income taxes an aggregate of two per cent (2%) of the interest upon said principal; and the Trustor covenants and agrees that she will seasonably pay and save the holders of the bonds issued hereunder harmless from or by reason of such taxes, assessments and charges.

The Trustor hereby agrees, for the benefit of the persons who shall be from time to time the holders of said bonds and coupons, to reimburse such holders, upon written demand being made on the Trustor or upon Citizens Trust and Savings Bank or Canal Commercial Trust & Savings Bank of New Orleans, as her agents, for any taxes, assessments or charges which such holders may be required to pay, except as hereinbefore specified, unless and until the Trustor or the Trustee or either paying agent shall be required or permitted to pay, retain or deduct said taxes, assessments or charges.

Interest on said bonds shall be payable only on presentation and surrender of the several coupons for such interest as they severally mature, and when paid, such coupons shall forthwith be cancelled.

Section 2. The Trustor agrees that she will not, directly or indirectly extend or assent to the extension of the time for the payment of any bond or coupon or claim for interest upon any of the bonds, and that she will not, directly or indirectly, be a party to or approve of any such arrangement by purchasing or funding any such bond or coupon, or in any other manner. In case the time for payment of any such bond or coupons or interest shall be so extended, whether or not such extension shall be with the consent of the Trustor, no claim for any such interest or for any amount due or any bond or coupon shall be deemed to subsist, except subject to the prior payment in full of the principal of all bonds then outstanding and of all matured interest or bonds, the payment of which has *nt* been so extended.

Section 3. The Trustor covenants and agrees that she will from time to time duly pay and discharge, or cause to be paid and discharged, all taxes, assessments and governmental charges lawfully imposed upon tye trust estate, or upon any part thereof, or upon the income and profits thereof, and will also pay and discharge all taxes, assessments and governmental charges imposed upon the interest of the Trustee, or upon the interest of the holder of any bond or coupon, in the trust estate; provided, however, that if the Trustor shall in good faith contest by legal proceedings any tax, assessment or charge in this section mentioned, the Trustor shall have the right, pending such contest, to delay or defer the payment thereof, but not so as to lose the right of redemption from any sale under any tax, assesment or governmental charge, and not if such payment shall, in the opinion of the Trustee, be necessary to prevent the forfeiture or loss of the trust estate or any part thereof.

Section 4. The Trustor covenants and agrees that she is well seized of the property herein conveyed and had good and indefeasible title to the same; and has good right, full power and lawful authority, to grant, bargain and sell, and to convey and mortgage the same in the manner and form herein done or intended to be done, and will warrant and forever defend the same to the Trustee against the claims of all persons whomsoever.

Section 5. The Trustor covenants and agrees that this indenture now is and always will be kept a first lien upon all the property described or mentioned in the granting clause hereof, and upon all property that hereafter shall be placed upon said property, and upon all renewals and replacements of such property; and that she will not voluntarily create or suffer to be created or to arise any lien or charge of priority to or preference over the lien of these presents upon the property mortgaged or deeded in trust, or any part thereof or interest therein, or upon the income thereof; and that she will forthwith after the same shall accrue, pay or cause to be discharged or paid, or will make adequate provision for the satisfaction or discharge of every lawful claim and demand for labor, material, supplies or other objects which, if unpaid, might by law be given precedence to this indenture as a lien or charge upon said property, or any part thereof, or upon the income thereof; and that she will not suffer any claim of paramount title to be established to any of the said property, but if so established, she will proceed to acquire or extinguish any such claim of title.

Section 6. The Trustor covenants and agrees that so long as any of said bonds are outstanding, she will insure and keep insured or cause to be insured and kept insured

in some standard and solvent insurance company or companies, authorized to transact business in the State of California, and approved in writing by Sutherlin-Barry & Company, Inc., any and all buildings nor or hereafter erected upon the real property hereby mortgaged or deeded in trust, together with the fixtures and appurtenances thereof, against loss or damage by fire and/or earthquake in at least the amounts following; not to exceed, however, in any case, the full insurable value of such property:

(1)

ENGSTRUM ARMS APARTMENT HOTEL PROPERTY.

(a) Fire insurance to the net amount of Two hundred ninety thousand ($290,000); provided, however, that this amount may be reduced by seven hundred fifty dollars ($750) for each One thousand dollars ($1,000) principal amount of bonds under Three hundred sixty thousand dollars ($360,000) which may be outstanding hereunder, except that this provision for reduction of the amount of said insurance shall not be applicable if at the time the so-called Venice properties are not subject to the lien of this mortgage or deed of trust; and

(b) Earthquake insurance in an amount equal to Fifty per cent (50%) of the principal amount of bonds outstanding hereunder.

(2)

VENICE PROPERTIES

(a) Fire insurance in a net amount of Seventy thousand dollars ($70,000) provided, however, that this amount may be reduced by Fifty Dollars ($50) for every One thousand dollars ($1,000) principal amount of bonds under

Three hundred sixty thousand dollars ($360,000) which may at the time be outstanding hereunder;

(b) Earthquake insurance in an amount equal to Fifty per cent (50%) of the full insurable value of said properties.

The Trustor will also carry in like company or companies insurance against loss of rentals resulting from damage to said building or buildings by fire or earthquake in an amount equal to the maximum rental insurance that may be obtained in respect of such properties.

All policies of insurance provided for in this section shall contain customary "New York Standard Loss Payable" clauses and each policy of fire insurance herein provided for shall contain an endorsement of the customary "Fallen Building Clause Waiver". All such policies shall be delivered to and be payable to the Trustee; and the Trustor will promptly pay or cause to be paid the premiums for such insurance as they may accrue. In case of any loss under any such policy or policies of insurance, the Trustee may adjust, collect and receipt for and in its discretion compromise all claims under said policy or policies, and any moneys due thereunder shall be paid to the Trustee.

In case of destruction of, or damage to, *aoo* or any part of said building or buildings by fire or earthquake, the Trustor shall either forthwith proceed to rebuild, restore or repair said building or buildings or to redeem or purchase and cancel all bonds secured hereunder then outstanding. In case the Trustor shall so proceed to rebuild, repair, or restore, the building or buildings as so rebuilt, repaired or restored shall be of a value not less than, and be substantially similar in all respects and not inferior in structure or equipment to, the building or buildings so destroyed or damaged.

In the event that any such loss shall exceed Twenty-five thousand dollars ($25,000) and the Trustor shall not elect to redeem or cause to be purchased and cancelled all bonds then outstanding, the Trustor shall submit to the Trustee, plans and specifications for the repairing, rebuilding or restoring of the property damaged or dest*or*yed, which plans and specifications shall be subject to the approval of the Trustee, and shall exhibit to the Trustee any contract or contracts for such work or for the supplying of any such materials. In order to determine such cost, the Trustee may thereupon obtain from any disinterested architect or contractor an estimate of the cost of such repairing, rebuilding, restoring, renewing or replacing, the cost of which may be deducted from the amount of such insurance.

Any money received under any such policy of insurance against loss of rentals shall be deposited with the moneys provided to be deposited under Article IV hereof and such deposits shall be considered as discharging the obligation of the Trustor to make monthly payments as in Article IV provided to the extent to which any such transfers are made. Any money received by the Trustee on account of any loss or damage covered by any other of the above policies of insurance may, if the Trustor shall proceed to repair, rebuild or restore, be used and applied by the Trustor for the purpose of such rebuilding, repairing or restoring. In such event the Trustee shall pay over said insurance moneys or a part thereof upon the written request of the Trustor which request shall recite and declare that the Trustor has actually expended in the rebuilding, repairing, or restoring of the property dest*or*yed or damaged a sum equal to or not less than the amount of moneys called for in such demand, which request shall also

be accompanied by a certificate of an architect satisfactory to the Trustee that the Trustor has actually expended such amount in such rebuilding, repairing or restoring, and that such rebuilding, repairing or restoring has been completed free from all claims or mechanics' liens, and that the building or buildings as so rebuilt, repaired or restored is of a value not less than and is substantially similar in all respects and not inferior in structure or equipment to the building or buildings so damaged or destroyed.

If it shall appear, at any time, after the Trustor shall have proceeded to rebuild, repair or restore as aforesaid, that said insurance moneys are not sufficient to pay for the repairing or completion and erection of said building or buildings, as aforesaid, the Trustor shall on demand of the Trustee deposit such shortage or deficit with the Trustee, or the Trustor may deliver *to* cause to be delivered to the Trustee a good and sufficient bond with sureties satisfactory to the Trustee and in a form satisfactory to the Trustee, which bond shall be conditioned that the Trustor shall and will repair such building or erect and complete such new building or buildings as aforesaid, free from all claims or mechanics' liens. Such demand having been made the Trustee shall disburse said insurance moneys as aforesaid, upon such deposit being made or upon such bond being furnished but not otherwise. In the repair or erection of such new building or buildings, any delays caused by insurrection, riots, strikes, storms, fires, the Act of God, or any unavoidable shortage of materials or labor, or other causes beyond the control of the Trustor (financial inability excepted) shall not be considered as constituting a lack of diligence on the part of the Trustor.

Such insurance moneys until so paid over, shall be held by the Trustee as part of the trust estate. Any and all balances remaining in the hands of the trustee after the complete repairing, rebuilding, and restoring of said building or buildings, as aforesaid, shall be applied by the Trustee to the redemption or purchase and cancellation of bonds as provided in Article V.

In case the Trustor shall not within ninety (90) days after the happening of such damage or destruction of such building or buil*s*ings the Trustee shall thenceforth hold all insurance moneys received by it as above provided for the purchase or redemption of bonds secured hereby and the Trustor shall forthwith deposit with the Trustee such amount as will be sufficient, in addition to all amounts then held by the Trustee and available for such purposes, to redeem on the next interest payment date all of the bonds secured hereby then outstanding, and the Trustee shall thereupon apply such moneys to redeem all such bonds in the manner provided in Article V. hereof.

Section 7. The Trustor covenants and agrees that, so long as any of the said bonds are outstanding, she will carry in some standard and solvent insurance compan*t* or companies authorized to transact business in the State of California and approved in writing by Sutherlin-Barry & Company, Inc., policies of public liability insurance, boiler insurance, and workmen's compensation insurance (or employees' liability insurance) insuring against loss or damage to persons or property in or upon or in connection with the property hereby mortgaged or deeded in trust, all of such insurance to be in no event less than the following respective amounts:

(1)

ENGSTRUM ARMS APARTMENT HOTEL PROPERTY.

Boiler insurance, Fifty thousand dollars ($50,000); public liability insurance, Fifty Thousand dollars ($50,00); workmen's compensation or employees' liability insurance, for the amount fixed by law but in no event less than Twenty-five thousand dollars ($25,000).

(2)

VENICE PROPERTIES.

Workmen's compensation or employees' liability insurance for the amount fixed by law.

The policies for such boiler insurance shall be payable to the Trustee for the benefit of the Trustor and the holders of the bonds and coupons as their respective interests shall appear, and the policies for such workmen's compensation insurance and such public liability insurance shall be payable to the Trustor. All said insurance policies shall be delivered to the Trustee by the Trustor. The Trustor covenants and agrees promptly to pay the premiums for such insurance as they become due.

Section 8. The Trustor covenants and agrees that if she shall fail to perform any of the covenants contained in Sections 3, 5, 6 or 7 of this Article, the Trustee may, but shall not be obliged to, perform the same or cause the same to be performed on behalf of the Trustor, making advances therefor, and the Trustor agrees that she will upon demand, repay all sums so advanced, together with interest at seven per cent (7%) per annum until paid; and all sums so advanced by the Trustee, or by anyone on its behalf, are hereby declared to be secured by lien upon the trust

estate in priority to the bonds and coupons hereby secured. No such advance shall be deemed to relieve the Trustor from any default hereunder.

Section 9. The Trustor covenants and agrees that she will cause this indenture to be duly and properly filed for record and recorded in the office of the County recorder of Los Angeles County, California, with all convenient speed, and that it will be properly and legally indexed in such office as a deed, a trust deed, a mortgage or realty, a mortgage of personalty and a power-of-attorney, so that due and legal notice of its terms will be given; and that she will hereafter cause to be duly and properly filed for record and recorded any supplementary conveyance or transfer, as far as may be necessary to make this indenture and all such conveyances a good and valid lien upon the properties respectively covered thereby against all persons whomsoever.

Section 10. The Trustor covenants and agrees that she will at any time, make, do, execute and deliver all such further and other acts, deeds and things as shall be reasonably required to effectuate the intention of these presents and to assure and to confirm to the Trustee or its successors all and singular the property hereinbefore described and hereby intended to be granted, so as to render the same available for the security and satisfaction of the bonds secured hereby, according to the intent and purpose herein expressed.

Section 11. The Trustor covenants and agrees that she will execute and acknowledge and deliver to the Trustee such further assignments or transfers or other instruments as the Trustee may from time to time require to enable the Trustee, in the event of its taking possession of

the property hereunder, to collect or receive all moneys, rentals, or tolls, due or to grow due, upon any leases and contracts (including existing leases and contracts) or in any manner whatsoever.

Section 12. The Trustor covenants and agrees that she will at all times hereafter upon the written request of the Trustee or of the holder or holders of twenty-five per cent (25%) in amount of the bonds secured by this indenture then outstanding, furnish and deliver to such Trustee or holder or holders, as often and in such form as may be required by such Trustee or holder or holders a statement in writing, showing her financial condition and specifying particularly her earnings and expenses, together with the earnings and expenses of the Trust estate, month by month, for a period of at least one year immediately prior to the time of making any such request.

Section 13. The Trustor covenants and agrees that proper books of record and account will be kept, in which full, true and perfect entires will be made of all dealings or transactions of or in relation to the plants, buildings, properties, business and affairs of the Trust estate, which books shall at all reasonable times be open to the inspection of the Trustee.

Section 14. The Trustor covenants and agrees that any business carried on by her on the trust estate will be continually carried on and conducted in an efficient manner; that all property, buildings, improvements, machinery, fixtures, appliances and equipment useful and necessary in the carrying on of said business will be kept on said property and maintained in good condition and in thorough repair and in a state of high operating efficiency, and, if

worn or injured, will be replaced by other property suitable and of at least equal value.

Section 15. The Trustor covenants and agrees that at any and all times she will permit the Superintendent of Banks of the State of California, or his duly authorized representative, to make an examination of the real and/or personal property, books, records and accounts of the Trustor. Any investigation made pursuant to the provisions of this section shall be at the expense of the Trustor. The Trustor covenants and agrees to furnish for the use of the Superintendent of Banks of the State of California semi-annual statements covering the following matters:

(a) Total amount of bonds authenticated by the Trustee;

(b) Total amount of bonds retired and cancelled;

(c) Whether or not interest on bonds has been paid promptly at *ach* maturity;

(d) Whether or not all matured interest coupons have been cancelled; and

(e) Whether or not any land covered by the granting clauses hereof has been released, and, if any, a description of the same.

The Trustee will cooperate with the Trustor in the preparation of such statements and will sign the same and verify them as to such matters contained therein as may be within the knowledge of the Trustee.

Section 16. The Trustor covenants and agrees that she well and truly will keep, observe and perform any and all obligations and regulations now or hereafter imposed upon her by contract or prescribed by any law of the United States or of any state, or by any ordinance of any municip-

ality or governmental body having jurisdiction or control thereof, or in respect thereto, as a lawful condition to the continued enjoyment and use of the property, leases, contracts, rights, and franchises now owned by her, or hereafter acquired by her, to the end that such property, leases, contracts, rights and franchises and the use thereof may be maintained and preserved and may not become abandoned, forfeited or in any manner impaired.

ARTICLE IV.

PROVISIONS FOR PAYMENT OF PRINCIPAL AND INTEREST OF BONDS.

The Trustor covenants and agrees that on the 15th day of each calendar month commencing on tye 15th day of August, 1925, and continuing so long as any of the bonds issued hereunder are outstanding, she will deposit with the Trustee a sum of money in gold coin of the United States of America of or equal to the present standard of weight and fineness which shall be equal to one-twelfth (1/12th) of the total amount of principal and interest which will become due and payable upon the bonds issued hereunder then outstanding during the period from but excluding the 1st day of August then immediately preceding to and including the 1st day of August then immediately following.

Said payments shall be applied by the Trustee without further direction to the payment and discharge of the interest and principal payments becoming due on the bonds issued hereunder as such payments mature. Until so applied said payments shall be held in trust as part of the security for the bonds and coupons issued hereunder.

Nothing in this Article shall be deemed to relieve the Trustor of liability for the payment in full and when due of principal and interest of all bonds issued hereunder.

ARTICLE V.
PURCHASE AND REDEMPTION OF BONDS.

Section 1. All moneys held by the Trustee for the purchase or redemption of bonds issued hereunder (excluding money received by the Trustee under Article IV hereof) and all moneys received by the Trustee under any provisions of this mortgage or deed of trust which shall not be needed for the purpose for which they were received or for the disposition of which no other provision is in this mortgage or deed of trust made, shall be applied as hereinafter in this Article provided.

Section 2. Whenever Three thousand dollars ($3,000) or more of such money is held by the Trustee it shall invite offers (and whenever it holds less of such money it may invite offers) for the sale to it of a sufficient number of bonds issued hereunder as shall in its judgment be warranted by the amount of moneys then in its hands (a) by mailing a notice inviting such offers to Sutherlin-Barry & Company, Inc., and (b) (but only if requested so to do by the Trustor) by publishing once in a daily newspaper of general circulation published in Los Angeles, California, and in a daily newspaper published in New Orleans, a like notice; such mailing and such publication (if publication is had) to be made not less than five (5) days and not more than ten (10) days prior to the date specified in such notice for the opening of the offers. Upon the opening of such offers the lowest offers submitted in the order of their receipt, if at a price or prices not higher than the principal amount of such bonds, plus interest secured on such principal amount, plus the premium at which such bonds could be redeemed at the next possible redemption date, shall be accepted without preference or distinction on ac-

count of the maturity of the bonds so offered or otherwise except by reason of price and time of receipt of offers to the extent of the money then in the hands of the Trustee for that purpose, and bonds shall be purchased to that extent. If bonds equal to the amount of moneys then in the hands of the Trustee for that purpose are not offered at or less than the price above specified the Trustee forthwith shall notify the Trustor of the unapplied amount of such moneys in its hands and such unapplied moneys shall be available to the Trustor for the redemption of bonds issued hereunder. The Trustor covenants and agrees that she will thereupon call for redemption upon the next possible redemption date as many bonds as such moneys shall be sufficient to redeem.

Section 3. On any semi-annual interest date the Trustor may redeem and pay all or any part of the bonds secured hereby then outstanding, prior to the maturity thereof, by the payment of the principal thereof and interest on the principal accrued to date of redemption, together with a premium of five per cent (5%) upon the principal thereof, if such redemption be effected on or before August 1, 1930; a premium of four per cent (4%) upon such principal if such redemption be effected thereafter and on or before August 1, 1935; and a premium of two per cent (2%) upon such principal if such redemption be effected after August 1, 1935, and prior to maturity.

The Trustor shall give written notice to the Trustee of her election to redeem and of the number of bonds to be redeemed; not less than sixty (60) *ays* prior to the date fixed for such redemption, and in case the Trustor shall elect to redeem less than the entire issue of bonds secured hereby then outstanding, upon receiving from the Trustor

notice of her election to redeem, the Trustee shall select the bonds so to be redeemed, selecting from the bonds then outstanding those of the longest maturity in their inverse numerical order, and shall furnish the Trustor a list of such bonds.

Section 4. In case of any call for redemption, the Trustor shall publish in one daily newspaper of general circulation in the City of Los Angeles, County of Los Angeles, State of Calfiornia, and in one daily newspaper published in New Orleans, Louisiana, at least once in each week for four (4) successive weeks, the first publication to be not less than forty (40) and not more than sixty (60) days before the date of redemption, a notice stating that the Trustor has called for redemption the bonds specified in such notice; that upon the date therein designated there will become due upon each of such bonds the principal thereof and interest accrued to date of redemption, together with a premium of five per cent (5%) upon the principal thereof, if such redemption be effected on or before August 1, 1930; a premium of four per cent (4%) upon such principal if such redemption be effected thereafter and on or before August 1, 1935, and a premium of two per cent (2%) upon such principal if such redemption be effected after August 1, 1935, and prior to maturity, and that no further interest will accrue upon such bonds after the date fixed for redemption.

Section 5. On or prior to the date of redemption, the Trustor shall deposit with the Trustee in United States gold coin of or equivalent to the present standard of weight and fineness, a sum sufficient to pay the principal of the bonds called for redemption and the interest and premium thereon, and shall file with the Trustee a certi-

ficate authorizing the call for redemption of such bonds. On or after the date fixed for redemption, from the sum so deposited by the Trustor, the Trustee shall pay to the holder or holders of the bonds called for redemption the amounts payable on such bonds, upon surrender of such bonds and upon surrender of the accompanying coupons maturing on the date of redemption, together with all subsequent coupons. On and after the redemption date when any bonds called for redemption become payable as aforesaid, the moneys applicable as aforesaid to the payment and redemption thereof shall be held by the Trustee in special trust deposit for payment of such bonds in the manner and at the rate specified; and from and after such redemption date, if the moneys sufficient for such redemption shall have been so deposited, and the notice specified shall have been given, no further interest shall accrue upon any such called bonds, and any coupons appertaining to such bonds for interest maturing after such date shall become and be null and void, anything in such bond or in such coupons or in this agreement to the contrary notwithstanding. All bonds so redeemed and paid by the Trustee shall be cancelled by the Trustee.

Section 6. The Trustee shall not be required to give notice of any call for redemption, and in case any question shall arise as to whether notice of redemption has been sufficiently given by the Trustor the decision thereon of the Trustee shall be final and binding upon all parties in interest. In case, however, under any of the provisions of this mortgage or deed of trust the redemption of bonds shall at any time be required and the Trustee shall hold money available for such redemption, the Trustee may give the proper notices of redemption in the name of the

Trustor or in its own name if the Trustor refused or neglects so to do.

Section 7. All bonds that shall be purchased or redeemed and paid hereunder, together with all unmatured coupons, shall be cancelled by the Trustee and delivered to the Trustor.

Section 8. Upon deposit with the Trustee of the amount necessary to redeem all outstanding bonds issued hereunder and payment to the Trustee of its reasonable compensation, expenses and disbursements, and the receipt by the Trustee of proof satisfactory to it of the due publication of notice of redemption the Trustee shall upon the written request of the Trustor discharge and satisfy this mortgage or deed of trust and assign, or cause to be assigned, and deliver to the Trustor, her executor, administrators or assigns, all the trust estate then held by it hereunder except such amounts so deposited in respect of such redemption which amount shall thenceforth be held by the Trustee in trust for the payment to the holders of the bonds and coupons issued hereunder and then outstanding of the respective amounts due upon such redemption.

ARTICLE VI.

DEFAULT AND REMEDIES.

Section 1. An event of default hereby is defined to be the happening of one or more defaults or failures on the part of the Trustor, in cases as follows:

(a) In case default shall be made in the payment of any interest on any bond secured hereby, when and as the same shall become payable as therein and herein provided, and any such default shall continue for a period of sixty (60) days; or

(b) In case default shall be made in the payment of the principal of any bond secured hereby, when the same shall become due and payable; or in case default shall be made in the payment of taxes or insurance premiums pursuant to Sections 6 and 7 of Article III and the Trustee shall in writing have declined to pay the same on behalf of the Trustor; or

(c) In case default shall be made in the due observance or performance of any other covenant or condition contained herein, required to be kept or performed by the Trustor, and any such default shall continue for a period of sixty (60) days after written notice thereof to the Trustor from the Trustee, or from the holders of ten per cent (10%) in amount of the bonds secured hereby then outstanding; or

(d) In case the Trustor shall go or be put into bankruptcy or insolvency; or

(e) In case default shall be made in the payment of any interest, as set forth in paragraph (a) above or default shall be made in the observance of any covenant or condition, as set forth in paragraph (c) above, and during the continuance of such default but before the expiration of the sixty (60) day period of grace, there shall be an existing judgment against the Trustor remaining unsatisfied for more than ten (10) days and unsecured by bond on appeal or in any judicial proceeding by any party other than the Trustee, a receiver shall be appointed for the mortgaged property or any part thereof, or a judgment or order entered for the sequestration of any of said property.

Section 2. If one or more of the events of default shall happen, then and in each and every such case the Trustee, either personally or by its agents or attorneys, may, in its

discretion, and upon the written request of the holders of twenty-five per cent (25%) in amount of the bonds secured hereby then outstanding (unless proceedings for the foreclosure of this mortgage or deed of trust and the appointment of a receiver as hereinafter provided are instituted) forthwith shall enter into and upon and take and hold possession of the trust estate, and may exclude the Trustor and her agent,s, servants, executors, administrators, successors, assigns and all other persons or corporations wholly therefrom, and may use, operate, manage and control the trust estate to the best advantage of the holders of the bonds secured hereby.

Upon every such entry the Trustee from time to time, at the expense of the trust estate, either by purchase, repair or construction, may maintain and restore and insure or keep insured the trust estate and make all necessary repairs, renewals, replacements, alterations, additions, betterments and improvements, as it may deem judicious. The Trustee in case of such entry shall have the right to manage the trust estate and exercise all the rights and powers of the Trustor either in the name of the Trustor or otherwise, as the Trustee shall deem best; and shall be entitled to collect, take and receive all tolls, earnings, income, rents, issues and profits of the trust estate.

After deducting the expenses of operating the trust estate and of conducting the business thereof, and of all repairs, maintenance, renewals, replacements, alterations, additions, betterments and improvements, and all payments that may be made for taxes, assessments, insurance and prior or other proper charges upon the trust estate or any part thereof, as well as just and reasonable compensation for its own services and for the services of all counsel,

agents and employees by it properly engaged and employed, the Trustee shall apply the moneys arising aforesaid as follows:

First: In case the principal of none of the bonds secured hereby shall have become due, to the payment of interest in default in the order of the maturity of the coupons, with interest thereon at the rate of seven per cent (7%) per annum; such payments to be made ratably to the persons entitled thereto without discrimination or preference except as provided in Section 2, Article III, hereof, in the case of bonds and/or coupons the time for payment of which has been extended.

Second: In case the principal of any of the bonds secured hereby shall have become due by declaration or otherwise, first to the payment of the accrued interest, with interest at the rate of seven per cent (7%) per annum, on the overdue coupons in the order of their maturity, and then to the payment of the principal of all bonds secured hereby then due; such payments to be made ratably to the persons entitled thereto without discrimination or preference except as provided in Section 2, Article III hereof in the case of bonds and/or coupons the time for payment of which has been extended.

Upon the payment in full of whatever may be due for such principal or interest, or payable for other purposes, and providing for the next installment of interest to become due, the trust estate shall be returned to the Trustor, her heirs or assigns or to whomsoever may be lawfully entitled thereto.

Section 3. If one or more of the events of default shall happen the Trustee may and upon the written request of the holders of twenty-five per cent (25%) in amount of

the bonds secured hereby and then outstanding, shall, by notice in writing delivered to the Trustor, or recorded in the recorder's office in Los Angeles County, declare the principal of all bonds secured hereby then outstanding to be due and payable immediately, and upon any such declaration the same shall become and be immediately due and payable, anything in this indenture or in said bonds contained to the contrary notwithstanding.

This provision, however, is subject to the condition that, if at any time after the principal of said bonds shall have been declared due and payable, all arrears of interest upon all such bonds, with interest on the overdue installments of interest, the expenses of the Trustee and all other sums which may have become due and payable by the Trustor under the terms of said bonds or hereunder, other than the principal of said bonds so called due, shall be paid, or be collected out of the trust property and all other defaults, if any exist, shall be made good before any sale of the trust property shall have been made, then and in every such case the holders of a majority in amount of the bonds secured hereby then outstanding, by written notice to the Trustee, may waive such default and its consequences, and obtain from the Trustee a rescission of such declaration of the maturity of the principal; but no such waiver shall extend to or affect any subsequent default or impair any right consequent thereon.

Section 4. If one or more of the events of default shall happen, the Trustee in its discretion may, and upon the written request of the holders of twenty-five per cent (25%) in amount of the bonds secured hereby and then outstanding, shall proceed to protect or enforce its right or rights of the bondholders under this indenture by a suit in

equity or action at law, either for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for the foreclosure of this indenture, or for the enforcement of any other appropriate legal or equitable remedy as the Trustee shall deem most effectual in support of any of its rights or duties hereunder; and upon instituting such proceedings or in order to take possession as hereinbefore provided, the Trustee shall be entitled to the appointment of a receiver of the trust estate and to the sale of the trust estate as an entirety, if the court in its discretion shall so order.

Section 5. If one or more of the events of default shall happen, the Trustee, with or without entry, personally or by attorney, in its discretion may, and upon the written request of the holders of twenty-five per cent (25%) in amount of the bonds secured hereby then outstanding, shall proceed to sell to the highest and best bidder all and singular the trust estate and all rights, title, interest, claim, equity of redemption and demand of the Trustor therein and thereto. Such sale shall be at public auction at such time and place as the Trustee may fix. The Trustee shall give notice of the time and place thereof by publishing a notice setting forth the time and place thereof by publishing a notice setting forth the time and place of such sale, and describing in general terms the property to be sold, which said notice shall be published once a week for four (4) successive weeks in a newspaper of general circulation published in the City of Los Angeles, California, and in addition shall give any other notice which may be required by law.

Section 6. In the event of any sale, whether made under the power of sale hereby granted and conferred, or under or by virtue of judicial proceedings, or of some judgment or decree of foreclosure and sale, the principal of all the bonds secured hereby, if not previously due, shall become and be immediately due and payable, anything in said bonds or in this indenture contained to the contrary notwithstanding.

Section 7. In the event of any such sale whether made under the power of sale hereby granted or conferred, or under or by virtue of judicial proceedings, or of some judgment or decree of foreclosure and sale, the whole of the trust estate shall be sold in one parcel, and as an entirety, including all real and personal property, and all other property of every name and nature covered by this mortgage or deed of trust (except money in any of the funds herein mentioned) unless otherwise directed by some court of competent jurisdiction, or unless in case of a sale made under the power of sale hereby granted, the Trustee, in its discretion, shall determine to sell said property and premises in parcels, in which case the sale shall be made in such parcels as may be specified in such order or decree of court, or as may be determined by the Trustee.

Section 8. The Trustee from time to time may adjourn any such sale to be made by it by announcement at the time and place appointed for such sale or such adjourned sales, and without further notice or publication it may make such sale at the time to which the same shall be so adjourned, but in the event of such adjournment or adjournments, sale shall be made within twelve (12) months from the date of sale first fixed in the advertisement.

Section 9. Upon completion of any such sale or sales the Trustee shall execute and deliver to the accepted purchaser or purchasers a good and sufficient deed, or deeds, of conveyance and transfer of the property sold or shall execute and deliver in conjunction with the deed or deeds of the court officer conducting such sale, a proper release of such property. The Trustee hereby is appointed the true and lawful attorney irrevocably of the Trustor in her name and stead to make all necessary deeds of conveyance and transfer of such property; and for that purpose the Trustee may execute all necessary acts of conveyance, assignment and transfer, and may substitute one or more persons or corporations with like power; and the Trustor hereby ratified and confirms all that her said attorney or attorneys, or such substitute or substitutes shall lawfully do by virtue hereof. Nevertheless, the Trustor if so requested by the Trustee, shall execute and deliver to the purchaser or purchasers such deeds of conveyance, assignments, transfers and releases as may be designated in such request.

Section 10. Any such sale or sales shall divest all right, title, interest, claim, equity of redemption and demand whatsoever, either at law or in equity, of the Trustor, in and to the property and premises sold, and shall be a perpetual bar, both at law and in equity against her, her heirs, executors, administrators, successors and assigns, and against any and all persons claiming or to claim the property sold or any part thereof, from, through or under the Trustor, her heirs, executors, administrators, successors and assigns.

Section 11. The receipt of the Trustee or of the court officer conducting such sale shall be sufficient discharge

for the purchase money to any purchaser of the property, or any part thereof, sold as aforesaid, and no such purchaser or his representatives, grantees, or assigns, after paying such purchase money and receiving such receipt, shall be bound to see to the application of such purchase money upon or for any trust or purpose of this indenture, or in any manner whatsoever be answerable for any loss, misapplication or non-application of such purchase money or any part thereof or be bound to enquire as to the authorization, necessity, expediency or regularity of any such sale.

Section 12. In case of any such sale, whether pursuant to judicial decree or otherwise, the purchaser for the purpose of making settlement or payment of the property purchased, shall be entitled to turn in or apply toward the payment of the purchase price any bonds issued hereunder and any matured and unpaid coupons and to be credited therefor, to the extent of the value of or amount which would be payable upon such bonds and coupons upon a distribution among the bondholders of the net proceeds of such sale, after making the deductions allowable under the terms hereof for the costs and expenses of the sale and otherwise; but such bonds and coupons so applied in payment by the purchaser shall be deemed to be paid only to the extent so applied.

Section 13. At any such sale, the Trustee or any bondholder or their agents may bid for and purchase such property, and may make payment on account thereof, as aforesaid, and upon compliance with the terms of sale may hold, retain and dispose of such property without further accountability therefor.

Section 14. The purchase money, proceeds and avails of any such sale, together with any sums which then may be held by the Trustee, or be payable to it under any of the provisions of this indenture as part of the trust estate or of the proceeds thereof, shall be applied as follows:

First: To the payment of the costs, expenses, fees and other charges of such sale, a reasonable compensation to the Trustee, its agents and attorneys, all expenses and liabilities incurred and advances made by the Trustee in managin*ing* and maintaining the property, and all taxes, assessments, water rates or liens thereon prior to the lien of these presents, except any taxes, assessments, water rates or other superior lien subject to which such sale shall have been made.

Second: Any surplus then remaining, to the payment of the whole amount owing and unpaid upon the principal and interest of the bonds secured hereby with interest on the overdue installments of interest at the rate of seven per cent (7%) per annum; and in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid, then to the payment of such principal and interest ratably to the aggregate of such principal and accrued and unpaid interest, without preference or priority of principal over interest or of interest over principal or of any installments of interest over any other installment of interest, except as specified in Section 2 of Article III in the case of bonds and/or coupons the time of payment of which has been extended.

Third: Any surplus then remaining to the Trustor, her heirs and assigns, or to whomsoever may be lawfully entitled to receive the same, upon lawful demand being made therefor.

Section 15. In case of a sale of the trust estate either under any power hereby granted or under judicial decree, and of the application of the proceeds of sale to the payment of the debt secured hereby, the Trustee in its own name and as Trustee of an express trust, shall be entitled to receive and to enforce payment of any and all deficiency or amounts then remaining due and unpaid upon any and all of the bonds issued hereunder and then outstanding for the benefit of the holders thereof, and shall be entitled to recover judgment for any portion of the mortgage debt remaining unpaid, with interest. In case of the death or bankruptcy of the Trustor, the Trustee in behalf of the bondholders and as their attorney in fact may file any claim or claims in the matter of her estate as shall be necessary to protect the bondholders in the recovery of any such deficiency.

Section 16. Any moneys recovered or collected by the Trustee under Section 15 of this Article shall be applied by the Trustee as specified in Section 14 of this Article.

Section 17. No remedy herein conferred upon or reserved to the Trustee or to the holders of bonds secured hereby is intended to be exclusive of any other remedy, but each and every such remedy shall be cumulative, and shall be in addition to every other remedy given hereunder, or now or hereafter existing at law or in equity or by statute; and every power and remedy given to the Trustee or the bondholders by this indenture may be exercised from time to time and as often as may be deemed expedient.

Section 18. No delay or omission of the Trustee or of any holder of bonds secured hereby to exercise any right or power arising from any default, shall impair any such right or power or shall be construed to be a waiver of any

such default or acquiescence therein. In case the Trustee shall have proceeded to enforce any right under this indenture by entry, foreclosure or otherwise, and such proceedings shall have been discontinued or abandoned because of waiver or for any other reasons, or shall have been determined adversely to the Trustee, then and in every such case the Trustee and the bondholders, severally and respectively shall be restored to their former positions and rights hereunder, in respect to the trust estate; and all remedies, rights and powers of the Trustee and the bondholders shall continue as though no such proceedings had been taken.

Section 19. The Trustor covenants and agrees that (1) In case default shall be made in the payment of any interest on any of the bonds at any time outstanding secured hereby, and such default shall have continued for a period of sixty (60) days; or (2) In case default shall be made in the payment of principal of any such bonds when the same shall become payable, whether upon the maturity of said bonds, or by declaration as authorized by this indenture, or upon a sale as set forth in this Article, then upon demand of the Trustee, the Trustor will pay to the Trustee, for the benefit of the holders of bonds and coupons entitled to receive such principal and interest so in default, the whole amount that then shall have become due and payable, for such interest or principal, or both, as the case may be, with interest upon the overdue installments of interest at the rate of seven per cent (7%) per annum; and in case the Trustor shall fail to pay the same forthwith upon such demand, the Trustee in its own name, and as Trustee of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid.

The Trustee shall be entitled to recover judgment as aforesaid either before or after or during the pendency of any proceedings for the enforcement of the lien of this indenture, and the right of the Trustee to recover such judgment shall not be affected by any entry or sale hereunder, or by the exercise of any other rights, power or remedy, for the enforcement of the provisions of this indenture, or the foreclosure of the lien thereof; and in case of a sale of the trust estate and of the application of the proceeds of sale to the payment of the debt secured hereby, the Trustee in its own name and as trustee of an express trust, shall be entitled to enforce the payment and to receive all amounts then remaining due and unpaid upon any and all of the bonds and coupons then outstanding, for the benefit of the holders thereof, and shall be entitled to recover judgment for any portion of such debt remaining unpaid, with interest as aforesaid. No recovery of any such judgment by the Trustee and no levy of execution pursuant to any such judgment upon property subject to the lien of this indenture or upon any other property, shall in any manner or to any extent affect the lien of this indenture upon the trust estate or any part thereof, or the rights, powers or remedies of the Trustee, or of the holders of bonds and coupons, but such liens, rights, powers and remedies shall continue unimpaired as before.

Any moneys thus collected by the Trustee under this section shall be applied by the Trustee, first, to the payment of the expenses, disbursements and compensation of the Trustee, its agents and attorneys, and, second, toward the payment of the amounts then due and unpaid upon the bonds and coupons in respect of which such moneys shall have been collected, ratably, and without any preference

or priority of any kind (except as provided in Section 2 of Article III hereof), according to the amounts due and payable upon such bonds and coupons respectively, at the date fixed by the Trustee for the distribution of such moneys, upon presentation of the several bonds and coupons and stamping such payment thereof, if partly paid, and upon surrender thereof, if fully paid.

The powers granted to the Trustee by this section are expressly subject to the limitations prescribed by Section 20 of this Article.

Section 20. Notwithstanding the foregoing provisions of this article, the powers hereby granted to the Trustee are strictly subject to the limitations that if, by the commencement of any action at law to recover judgment for any amount due and unpaid hereunder or upon the bonds secured hereby, or by the exercise of any other remedy prior to or concurrently with proceedings to enforce the lien of this indenture upon the trust estate, the lien of this indenture upon the trust estate or the security hereby provided for would, despite the foregoing provisions of this Article, be surrendered, waived or lost, the Trustee shall have no power to commence such action at law or to exercise such prior or concurrent remedy. But in case any statute now in force providing in terms or effect that the commencement of an action to recover a debt secured by mortgage or other instrument shall be deemed a waiver of such security, or prohibiting the exercise of any other remedy prior to or concurrently with proceedings to enforce the lien of a mortgage or other instrument upon the premises mortgaged, deeded in trust or otherwise set over as security, or any statute which now impairs or suspends the virtue of the foregoing provisions of this

Article and of which the Trustor might take advantage, despite said provisions, shall hereafter be repealed or cease to be in force, such statute shall not be deemed to have become or to be a part of the contract contained in this indenture.

ARTICLE VII.
RELEASES.

Section 1. At any time while the Trustor is not in default to the knowledge of the Trustee in the payment of principal or interest on any bond then outstanding hereunder or in respect of any of the covenants, agreements or conditions in this mortgage or deed of trust contained, she may request the Trustee to release from the lien of this mortgage or deed of trust the following portion of the property hereby mortgaged or deeded in trust, to-wit:

VENICE PROPERTIES

Lots "P" and "R" of Venice of America, in the City of Venice, County of Los Angeles, State of California, as per map recorded in Book 6, Pages 126 and 127 of Maps, in the office of the County Recorder of said County.
and the Trustee thereupon shall, subject to the provisions in Section 2 of this Article prescribed, release the above described portion of said property from the lien and operation of this mortgage or deed of trust.

Section 2. Prior to the release of the property described in Section 1 of this Article the Trustee shall have received (a) Seventy thousand dollars ($70,000) in Gold Coin of the United States of America of or equal to the standard of weight and fineness existing August 1, 1925, and (b) a request for the release of said property

signed by the Trustor, or a duly authorized agent, which request shall refer to the deposit of the above mentioned Seventy thousand dollars ($70,000) and request the Trustee to apply said moneys to the purchase or redemption of bonds pursuant to Article V of this mortgage or deed of trust.

Section 3. Any moneys received by the Trustee under Section 2 of this Article shall forthwith be applied by it to the purchase or redemption of bonds in the manner provided in Article V. hereof.

Section 4. Any compensation or money which may be received either by the Trustor or the Trustee on account of the taking or of damage to any property at the time subject to the lien of this mortgage or deed of trust by proceedings in eminent domain or for condemnation or expropriation shall be applied to the purchase or redemption of outstanding bonds in the manner provided in Article V hereof. The Trustor covenants and agrees that if any such moneys are paid to her she will immediately transfer such moneys to the Trustee to be applied as above provided.

ARTICLE VIII.
CONCERNING THE TRUSTEE.

Section 1. The Trustee accepts the trusts created by this mortgage or deed of trust, but upon and only upon the terms and conditions hereof, including the following, all of which shall bind the Trustor and the holders of bonds hereunder.

Section 2. All recitals statements and representations of fact herein and in the said bonds issued hereunder contained save only the Trustee's certificate upon the bonds are made solely by and on behalf of the Trustor, and the Trustee assumes no responsibility as to the correctness

of any such recitals, statements or representations, or as to the validity of this mortgage or deed of trust, or the bonds issued hereunder, or as to the amount or extent of the securities afforded by the property hereby or intended hereby to be conveyed, assigned and transferred, or as to the validity of the title of any of said property, or for the breach of any of the covenants or agreements hereof by the Trustor or as to the application of any of the bonds certified and delivered hereunder, or (except as otherwise expressly provided) of the proceeds of any of them for any of the purposes herein expressed, or otherwise, or for the use or disposition of the said bonds, or the proceeds thereof, or as to the due execution hereof by the Trustor, or as to the lien purporting or intended to be hereby created, or for or in respect of the title of the trust estate, or for any other act or things done hereunder, except through its own wilful misconduct or gross negligence.

Section 3. The Trustee shall not be personally liable for any debts contracted or obligations incurred by it, of for nonfulfillment of contracts, or for damages for injuries to persons or property, or for damages for the death of any person, or for salaries, during any period wherein the Trustee shall manage or be in possession of the property hereby conveyed, assigned and transferred, as aforesaid.

Should any suit or proceeding be brought against the Trustee, by reason of any matter or thing connected with the trusts hereby created, or by reason of its being such Trustee, it shall be under no obligation to enter an appearance by counsel or in any way to appear in or defend such suit or other proceeding unless requested by bondholders as herein provided., but it may nevertheless appear and

defend such suit or proceeding if it elects so to do, and in such case, it and its counsel shall be compensated therefor, and it shall have a first lien and charge upon the trust property for the payment of such compensation.

Section 4. The Trustee shall not be answerable for the default or misconduct of any agent or attorney appointed by it, if such agent or attorney shall have been selected with reasonable care.

Section 5. The Trustee shall be under no duty or obligation to pay or keep itself informed as to the payment of any taxes, assessments or other charges upon the property, or any part thereof, hereby or intended hereby to be conveyed, assigned and transferred, or which shall or may now or hereafter be lawfully imposed upon this instrument.

Section 6. The Trustee shall be under no duty or obligation to effect any insurance against loss or damage by fire or other peril upon any portion of the properties hereby or intended hereby to be conveyed, assigned and transferred, or to renew any policies of insurance thereon,

The Trustee shall be under no duty or obligation to see to the delivery to it of any insurance pol*k*icies or other security assigned or transferred hereunder or agreed to be assigned or transferred hereunder or to give notice of its rights, or interest hereunder of the execution of this mortgage or deed of trust to any of the holders of such policies of insurance or other security assigned and transferred or agreed to be assigned or transferred hereunder or to any other person or corporation, and the Trustee is hereby authorized to accept for assignment and deposit hereunder, as herein provided, instruments on their face purporting to be the insurance policies, or other securities,

assigned and transferred, or agreed to be assigned and transferred hereunder.

Section 7. The Trustee shall be protected and held harmless in acting upon any notice, request, consent, certificate, bond or other instrument or paper provided for in this instrument believed by it to be genuine and to have been assigned or executed by the proper party or parties, and shall be entitled to receive the same, in its discretion, as conclusive proof of any fact or matter therein contained, upon which or by reason of which the Trustee may be required to act, or in its discretion may act. If in case at any time it shall be necessary or proper that the Trustee make any investigation respecting any facts preparatory to taking or not taking any action, or doing or not doing anything under this instrument as such Trustee, in respect to which this instrument does not make specific provision for evidence upon which the Trustee may or may not act, the certificate in writing of the Trustor shall be conclusive evidence in favor of the Trustee of such fact or facts and shall protect the Trustee. The Trustee may advise with legal counsel and shall be fully protected in respect to any action on this instrument taken in accordance with the opinion of such counsel.

Section 8. The Trustee shall not be responsible for the recording of this mortgage or deed of trust or of any supplement hereto or for any conveyance or transfer or further assurance, and shall not be required to file this mortgage or deed of trust or any such conveyance or transfer, or to see that notice of the lien and provisions hereof or thereof is given to any person, all of which matters the Trustor covenants and agrees to see to and perform as far as may be necessary to make this mortgage

or deed of trust and all such conveyances and transfers a good and valid lien upon the property respectively covered thereby against all persons whomsoever.

Section 9. The Trustee shall not incur any responsibility whatever in consequence of permitting or suffering the Trustor to retain possession of the mortgaged property, or any part thereof, and to use and enjoy the same, nor shall the Trustee be or become responsible for any destruction, deterioration, loss, injury or damages which may be done to any part of the property hereby mortgaged, transferred or conveyed, or for the sufficiency of the title thereto, or be in any way responsible for the consequence of any act or omission by the Trustor, her agents or servants.

Section 10. The Trustee may resign and discharge itself of the trusts created by this mortgage or deed of trust, by written notice to the Trustor, given thirty (30) days before such resignation shall take effect, or such other time as may be accepted by the Trustor. The Trustee may be removed at any time by an instrument, or concurrent instruments, in writing signed by the holders of a majority in amount of the bonds secured hereby then outstanding, such instrument or instruments to be filed with the Trustee.

Section 11. In case the Trustee, or any trustee hereafter appointed, shall, at any time, resign, or be removed, or otherwise become incapable of action, a successor or successors may be appointed by the holders of a majority in amount of the bonds secured hereby then outstanding by any instrument, or concurrent instruments, signed and acknowledged by such bondholders, or their attorneys in fact duly authorized; provided, nevertheless, and it is here-

by agreed and declared, that, in case of the resignation of the Trustee hereunder, the Trustor shall, by an instrument in writing, appoint a Trustee to fill such vacancy until a new trustee shall be appointed by the bondholders, as herein authorized. Any new trustee so appointed by the Trustor shall immediately and without further act be superseded by a trustee appointed in the manner provided above by the holders of a majority in amount of the bonds hereby secured. Every new trustee appointed in the place of the Trustee, or its successors in the trust, shall always be a trust company in good standing, authorized to accept said trust.

Section 12. Any such new trustee appointed hereunder shall execute, acknowledge and deliver to the Trustor an instrument accepting such appointment hereunder, and thereupon such new trustee shall, without further act, deed or conveyance, become vested with all the assets, properties, rights, powers and trusts of its predecessor in the trust hereunder, with like effect as if originally named as Trustee herein. But the Trustee retiring shall, nevertheless, on the written demand of the new trustee execute and deliver an instrument conveying and transferring to such new trustee upon the trusts herein expressed all the assets, property, contracts, stock, notes, mortgages, rights, powers and trusts of the Trustee so retiring and shall duly assign, transfer and deliver to the new trustee so appointed in its place all property and moneys held by it. Should any deed, conveyance or instrument in writing from the Trustor be required by any new trustee for more fully and certainly vesting and confirming to it the assets, properties, contracts, stocks, notes, mortgages, rights, powers, trusts and duties, then any and all such deeds, conveyances

and instruments in writing shall, on request of such new trustee, be made, executed, acknowledged and delivered by the Trustor.

Section 13. If at any time or times, in order to conform to any legal requirement, the Trustee shall deem it advisable, the Trustor and the Trustee shall have power to appoint, and shall unite in the execution, delivery and performance of all instruments and agreements necessary or proper to appoint, any trust company or one or more persons approved by the Trustee to act as co-trustee or co-trustees of all or any part of the trust estate jointly, with the Trustee originally named herein or its successor or successors.

Section 14. Any company into which the Trustee may be merged or with which it may be consolidated, or any company resulting from any merger or consolidation to which the Trustee shall be a party, shall ipso facto be and become successor of the Trustee hereunder and vested with all of the title to the whole trust estate and all the trusts, powers, discretions, immunities, privileges and all other matters as was the above named Citizens Trust & Savings Bank as the original trustee hereunder, without the execution or filing of any instrument or any further act, deed or conveyance on the part of any of the parties hereto, anything herein to the contrary notwithstanding.

Section 15. If any of the events of default hereinbefore defined shall have happened, it shall become the duty of the Trustee upon the written request of the holders of twenty-five per cent (25%) in amount of the bonds secured hereby then outstanding, and upon being indemnified as herein provided, to take all needful steps for the protection and enforcement of its rights and the rights of

the holders of the bonds secured hereby, or to exercise the power of entry herein conferred or to commence appropriate judicial proceedings by action, suit or otherwise, as the Trustee shall deem most expedient in the interests of the holders of the bonds secured hereby, unless otherwise directed by the bondholders as herein provided, but nothing provided herein shall affect any discretion herein given to the Trustee to determine whether or not it shall take action in respect of default without request from the bondholders. In the event that the Trustee, upon the happening of an event of default, shall have taken some action pursuant to its duties hereunder, whether upon its own discretion or upon the request of the holders of twenty-five per cent (25%) in amount of the bonds secured hereby, it shall be controlled in the matter of continuance or discontinuance of such action by the written request or discretion of a majority in amount of said bonds secured hereby, excepting, however, that such control shall not be exercised to stay or suspend a foreclosure suit instituted by the Trustee, nor to prevent such foreclosure from being filed, or to waive or stay any proceedings to be taken by the Trustee in case of any default, unless the principal of all bonds secured hereby which have matured according to their terms has been paid.

Section 16. The Trustee may become the owner of bonds and coupons secured hereby with the same right it would have if it was not Trustee hereunder.

ARTICLE IX.
MISCELLANEOUS PROVISIONS.

Section 1. The covenants and agreements herein contained shall be binding not only upon the Trustor but also

upon his heirs, executors, administrators, and assigns, and any act or proceeding by any provision of this indenture required or permitted to be done or performed by said Trustor may be done and performed with like force and effect by her heirs, executors, administrators and assigns. Any notice herein required to be given the Trustor may be given with like effect to her heirs, executors, administrators or assigns.

Section 2. In the event of the death or bankruptcy of the Trustor, the Trustee is hereby authorized and empowered as attorney in fact irrevocable and on behalf of the holders and owners of each and every outstanding bond secured hereby, but in its own name, to verify, present and/or prosecute a claim or claims for all outstanding sums, principal, interest and other amounts payable then or thereafter to said bondholders under the terms of this mortgage or deed of trust, or the bonds secured hereby, against the estate of said Trustor or to take such other action as may be necessary or advisable by reason of such death or bankruptcy, accompanying such claim or claims, if required by law, with a copy or copies of such outstanding bond or bonds in the form and manner so required. Provided, however, that the Trustee shall be under no duty to do any of the things in this section mentioned unless the holders of twenty-five per cent (25%) in amount of the bonds secured hereby then outstanding shall request such action, and unless the Trustee shall have first been reasonably indemnified.

Section 3. Nothing expressed or mentioned in or to be implied from this mortgage or deed of trust or the bonds issued hereunder is intended or shall be construed to give to any person or corporation or company other than the

parties hereto and the holders of bonds and coupons secured hereunder, any legal or equitable right, remedy or claim, under or in respect to this mortgage or deed of trust or any covenants, conditions or provisions herein contained; the covenants, conditions and provisions hereof intended to be and being for the sole and exclusive benefit of the parties hereto and the holders of the bonds and coupons secured hereunder.

Section 4. Except when otherwise indicated, the words, "the Trustee," or any other equivalent term, shall be held and construed to mean the Trustee for the time being hereunder, whether original or successor; and the words "Trustee," "Bond," or "Bondholder," shall mean the plural as well as the singular number; the words "Property," "Trust Property" or "Trust Estate" shall where not inconsistent with the context and unless otherwise expressly provided in this mortgage or deed of trust, be held and construed to include real and personal property of the Trustor of every kind and nature whatever that is subject to the lien of this mortgage or deed of trust.

Section 5. In order to facilitate the recording and indexing of this mortgage or deed of trust as a deed, trust deed, mortgage, chattel mortgage and power of attorney, the same may be simultaneously executed in two or more counterparts each of which so executed shall be deemed to be an original and such counterparts shall together constitute one and the same instrument.

Section 6. The Term "Sutherlin-Barry & Company, Inc.", when used in this mortgage or deed of trust, is hereby defined to mean the present Louisiana corporation of that name, and its successors and assigns, including any corporation into which or with which it or such successor or successors may be merged or consolidated.

ARTICLE X.
CONCERNING THE BONDHOLDERS.

Section 1. All rights of action on or because of the bonds issued hereunder or the interest coupons thereto appertaining and all rights of action under this mortgage or deed of trust are hereby expressly declared to be vested exclusively in the Trustee, except only as hereinafter provided; and such rights may be enforced by the Trustee without the possession of any of the bonds issued hereunder or the interest coupons thereto appertaining. Any suit or proceeding instituted by the Trustee shall be brought in its name as Trustee, and any recovery or judgment shall be for the pro rata benefit of the holders of bonds issued hereunder and the interest coupons thereto appertaining.

Section 2. Any request, direction, resolution or other instrument required by this mortgage or deed of trust to be signed and executed by the bondholders may be in any number of concurrent writings of similar tenor, and may be signed or executed by such bond holders in person or by attorney or agent appointed in writing. Proof of the execution of any such request, direction, resolution or other instrument, or of the writing appointing any such attorney or agent, and of the ownership of bonds, if made in the following manner, shall be sufficient for any purpose of this mortgage or deed of trust and shall be conclusive in favor of the Trustee with regard to due action taken by it under such request;

(a) The fact and date of the execution by any person of any such writing or instrument may be proved by the certificate of any officer in any jurisdiction, who by the laws thereof has power to take acknowledgem*tns* within

said jurisdistion, certifying that the person signing such writing or instrument acknowledged before him the execution thereof.

(b) The fact of the holding of bonds by any person executing any instrument as bondholder and the amount and issue number of any such bonds, and the date of his holding the same may be proved by certificate executed by any bank or trust company in the United States, wherever situated, if such certificate shall be deemed by the Trustee to be satisfactory, showing that at the date therein mentioned such person had on deposit with such bank or trust company the bonds described in such certificate.

Section 3. No holder of any bond or coupon secured hereby shall have the right to institute any suit, action or proceeding at law or in equity, upon or in respect of this mortgage or deed of trust or of the bonds or coupons secured hereby or for the execution of any trust or power hereof or for the appointment of a receiver or for any other remedy under or upon this mortgage or deed of trust, unless such holder shall previously have given to the Trustee written notice of an event of default; and unless also the holders of twenty-five per cent (25%) in amount of the bonds secured hereby then outstanding shall have made written request upon the Trustee and shall have afforded to it a reasonable opportunity either to proceed itself to exercise the power hereinbefore granted, or to institute such action, suit or proceedings in its own name, and unless also such holders shall have offered to the Trustee reasonable security and indemnity against costs, expenses and liabilities to be incurred in or by reason of such action, suit or proceedings and the Trustee shall have refused or neglected to comply with such request within

a reasonable time thereafter. Such notification, request and offer of indemnity are hereby declared in every such case, at the option of the Trustee, to be conditions precedent to the execution of the powers and trusts of this mortgage or deed of trust and to any action or cause of action for foreclosure or for any other remedy hereunder, anything herein to the contrary notwithstanding.

It is understood, intended and hereby provided that no one or more holders of bonds or coupons shall have any right in any manner whatever to affect, disturb, or prejudice the lien of this mortgage or deed of trust by his or their action, or to enforce any right hereunder, except in the manner herein provided, and that all proceedings hereunder shall be instituted, had and maintained in the manner herein provided for the equal benefit of all holders of such outstanding bonds and coupons. Provided, however, that nothing contained herein shall defeat the right of an individual bondholder to pursue his legal or equitable remedy where his right of action arises out of collusion, fraud, gross negligence or wilful misconduct.

ARTICLE XI.
DEFEASANCE.

Section 1. Unless and until one or more of the events of default shall have happened, as hereinbefore specified, the Trustor shall possess and enjoy the property hereby mortgaged or deeded in trust with the appurtenances and all and singular the rights and franchises hereinbefore described, and receive, take, use and enjoy the tolls, income, earnings, rents, issues and profits thereof; but the Trustor covenants and agrees that she will first pay from such income, after paying expenses of operating and maintain-

ing said properties and the taxes and insurance thereon, the interest accruing and maturing upon the bonds issued hereunder, and provide for the payment of the principal of said bonds in the manner provided in Articles III, IV and V. hereof.

Section 2. If, when the bonds secured hereby shall become due and payable, the whole amount of the principal and interest due or accrued upon all of the bonds secured hereby then outstanding shall be paid or such amount shall be provided for by depositing with the Trustee hereunder, for the payment of such bonds, the entire amount due and to become due thereon for principal and interest, and the Trustor shall also pay or cause to be paid all other sums payable hereunder, and shall well and truly keep, perform and observe all things herein required to be kept, performed and observed by her according to the true intent and meaning of this mortgage or deed of trust; then, and in that case, all the property, premises, rights and interests hereby conveyed shall revert to the Trustor or to whomsoever may be entitled thereto; and the estate, right, title and interest of the Trustee therein shall thereupon cease, terminate and become void, and the Trustee shall, in such case, on demand of the Trustor and at the latter's cost and expense, enter satisfaction and discharge of this mortgage or deed of trust upon the public records.

ARTICLE XII.

PROVISIONS CONTRARY TO LAW.

If any one or more of the provisions, powers, covenants or agreements provided in this mortgage or deed of trust on the part of the Trustor or the Trustee to be performed or otherwise should be contrary to any express provisions

of law, or contrary to the policy of express law, though not expressly prohibited, or otherwise contrary to good morals, or against public policy, then such power, provision, covenant or covenants, agreement or agreements, shall be null and void, and shall be deemed separable from the remaining provisions, powers, covenants and agreements, and shall in no way effect the validity of this mortgage or deed of trust.

IN WITNESS WHEREOF, the Trustor has hereto set her hand and seal, and the Trustee has caused this agreement to be executed on its behalf by its officers thereunto duly authorized, and its corporate seal hereunto be affixed, as of the day and year first above written.

GRACE E. LOW (SEAL)

CITIZENS TRUST AND SAVINGS BANK

By.....

.....President

Attest:

By.....

Assistant Secretary

STATE OF CALIFORNIA,)
) SS.
COUNTY OF LOS ANGELES,)

On this 18th day of September, 1925, before me, NELLIE LEMERT, a Notary Public in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared GRACE E. LOW, known to me to be the person whose name is subscribed to the within instrument and acknowledged that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

NELLIE LEMERT
Notary Public in and for the County of
Los Angeles, State of California
(SEAL)

STATE OF CALIFORNIA,)
) SS.
COUNTY OF LOS ANGELES,)

On this.....day of....., 1925, before me ....., a Notary Public in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared ....., known to me to be the .....President, and....., known to me to be the Assistant Secretary of CITIZENS TRUST AND SAVINGS BANK, the corporation named in and which executed the within and foregoing instrument, and known to me to be the persons who executed the within instrument on behalf of said corporation therein named, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

....
Notary Public in and for the County of
Los Angeles, State of California.

STATE OF CALIFORNIA,)
) SS.
COUNTY OF LOS ANGELES,)

GRACE E. LOW, being first duly sworn, deposes and says:

That she is the party of the first part in the within instrument, and that said instrument is made in good faith and without any design to hinder, delay or defraud creditors.

GRACE E. LOW

Subscribed and sworn to before me this 18th day of Sept. 1925.

NELLIE LEMERT
Notary Public in and for the County of
Los Angeles, State of California. (Seal)

STATE OF CALIFORNIA, (
(SS.
COUNTY OF LOS ANGELES,)

..... and ..... being duly sworn, each for himself deposes and says: That said .....is the .....President and said .....is the Assistant Secretary of Citizens Trust & Savings Bank, party of the second part to the within instrument, and that said instrument is made in good faith and without any design to hinder, delay or defraud creditors.

.....

.....

Subscribed and sworn to before me this.....day of ....., 1925.

.....
Notary Public in and for the County of
Los Angeles, State of California

EXHIBIT "E"

Los Angeles, California,
June 4, 1926.

Sutherlin-Barry & Co., Inc.,
2505 West Sixth Street,
Los Angeles, California.

Gentlemen:

You were the original purchasers from me of all of the Grace E. Low Properties First Mortgage Seven Per Cent Serial Gold Bonds which were duly issued and sold by me under the trust indenture from the undersigned, Grace E. Low, to Citizens Trust and Savings Bank, as Trustee, dated as of August 1st, 1925. I understand that you now own or represent more than a majority of said bonds.

Events of default have happened under said trust indenture and are now continuing and the Trustee thereunder has declared the principal of all of said bonds to be now due and payable and has advertised and posted notice of sale of the properties covered by said trust indenture to be held May 25, 1926, at the hour of 10 o'clock A. M. at the western front entrance of the Court House in the City of Los Angeles, State of California. Upon my request, approved by you, the Trustee duly adjourned such sale to be held at the same place on Tuesday, June 1st, 1926, at 10 o'clock A. M. and again at my request, approved by you, such sale was further adjourned to be held at the same place on Tuesday, June 8th, 1926, at 10 o'clock A. M.

Since the execution of said Trust indenture the income from the property covered thereby has decreased and for various reasons I have been unable to meet the accruing interest and sinking fund and other charges upon said bonds and under said trust indenture. I hope, however,

soon to be able to negotiate a supplementary loan secured by all or part of said property and with the proceeds thereof to make all payments at the time due under said trust indenture except payments for the principal amount of bonds which have been declared due pursuant to the terms thereof and to obtain clear title to the furniture and equipment now in or upon the property described in said trust indenture as parcel 1.

It is very difficult to complete these negotiations at the present time because of the fact that the time of appeal for the plaintiff in the case of Reynolds v. Low (which affects the title to these properties) has not yet expired. I realize that the defaults under the above mentioned trust indenture have been long continuing and I recognize the right of the Trustee thereunder to cause the sale of the properties covered thereby to be made on June 8th, 1926, and also your right to require such sale to be made at that time. I realize also that if such sale is further postponed the interest and other charges accruing upon said bonds and under said trust indenture will increase in substantial amounts in proportion to the length of such postponement.

You have, however, expressed your willingness to afford me every opportunity to save my interest in the property and to avoid a sale or foreclosure so far as such concessions are not, in your opinion, inconsistent with your responsibility to your stockholders and creditors and to the bondholders and, in view of such expressions, I wish to submit to you the following proposal:

1. You will agree to use your best efforts to bring about a postponement of the above mentioned Trustee's sale until August 1, 1926;

2. In consideration of such agreement and in consideration of such postponement of sale, if such postponement be effected, I agree—

(a) To appoint at once, and keep in office as long as my default under said trust indenture shall continue, at my expense and as my agent and upon my responsibility a manager or superintendent satisfactory to you with general charge and authority over the management of the properties subject to said trust indenture, which manager and superintendent shall be instructed to apply as much of the net earnings hereafter accruing from said properties as shall be necessary for that purpose to the payment of the balance of a certain not (not over $500) owing by me to.....Lowe and to deposit all of the balance of such moneys with the Trustee under the above mentioned trust indenture to be held and applied by it as provided in Article IV of said trust indenture, it being understood, however, that no such deposit or application of such moneys shall be construed as curing any default existing under said trust indenture or as affecting the declaration of maturity of bonds made thereunder or the above mentioned notice and posting of sale. Such manager or superintendent shall be removed at any time upon your written request and replaced by another satisfactory to you;

(b) That I shall use my best efforts (1) to cause to be deposited with the Trustee under said trust indenture a sum equal to all moneys that are due thereunder and shall be due thereunder at the time of such deposit, other than the principal amount of bonds the maturity of which has been accelerated by declaration; (2) to cause to be deposited with the Trustee under said trust indenture sufficient moneys to cover the three monthly payments pro-

vided in ARTICLE IV thereof to be made on August 15, September 15, and October 15, 1926; (3) to acquire and cause to be subjected to a first lien or charge to secure the above mentioned bonds, (in a manner to be approved by you), all of the personal property now constituting the furniture and equipment in or upon the property described as parcel 1 in said trust indenture (other than such furniture, and equipment as is now owned by the individual occupants of rooms or apartments in said property); and (4) to cause you to be reimbursed for attorneys' fees up to the amount of twelve hundred dollars ($1200) paid or incurred by you in connection with the defaults under said trust indenture, and that if all of the matters provided for in the above clauses (1), (2), (3), and (4) shall not have been duly accomplished and completed on or before August 5, 1926, that then I shall make no objection, and shall not allow any objection to be made on my behalf, to the immediate sale or foreclosure by the Trustee under said trust indenture of any or all of the property covered thereby, and I further agree that if you bid and are the purchaser at such sale, and in connection with such purchase shall have bid a sum not less than the amounts then due under said trust indenture, or shall have caused those entitled to moneys thereunder to have waived their rights to an action for any deficiency against me, that I will at the time of such sale or immediately thereafter, execute and deliver to you, or your nominee, a proper grant deed or conveyance transferring to you, or your nominee, all the interest which I have now and all that I shall have at that time in the property covered by such indenture. I shall, however, retain my right to the surplus of the proceeds of sale which may be due me as Trustor under the provisions of

said trust indenture in the event that your successful bid is higher than all amounts at the time due under said trust indenture. I further agree that in the event of such purchase by you I shall forthwith surrender possession to you or your nominee of all of the property so purchased.

(3) In the event that I comply with my agreements under subdivision (a) of paragraph 2 above, and duly cause to be accomplished and completed the matters provided for in subdivision (b) of said paragraph 2 you will agree to use your best efforts to bring about another postponement of the above mentioned Trustee's Sale until October 6, 1926, and if on that date there shall be on deposit with the Trustee, to be applied in accordance with the provisions of Article Iv of said trust indenture, sufficient moneys to cover the monthly paym ents provided in Article IV of the above mentioned trust indenture to be made on November 15, December 15, 1926 and January 15, 1927, and no moneys shall be due and owing under said trust indenture except in respect of the principal of bonds, the maturity of which has been accelerated by declaration, then you will use your best efforts to cause to be rescinded the declarations by which the maturity of bonds now outstanding under said trust indenture has been accelerated.

4. This agreement shall not in any affect the rights of the Trustee under said trust indenture nor lessen the obligations of the Trustor thereunder.

Your acceptance of the above proposition will be effected by your execution of your endorsement affixed below.

Yours very truly,

GRACE E. LOW

Accepted and agreed to this 4 day of June, 1926.

SUTHERLIN-BARRY & CO., INC.
By JNO E SUTHERLIN
President

[Endorsed]: Filed Nov. 19, 1928 R. S. Zimmerman, Clerk, by M. L. Gaines Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

SUMMONS

Action brought in the said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City of Los Angeles, County of Los Angeles, State of California.

The President of the United States of America, Greeting:

To Sutherlin, Barry & Company, Inc., and John E. Sutherlin,

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the District Court of the United States, in and for the Southern District of California, Southern Division and to file your plea, answer or demurrer, to the complaint filed therein (a copy of which accompanies this summons), in the office of the Clerk of said Court in the City of Los Angeles, County of Los Angeles, State of California, within twenty days after the service on you of this summons, or judgment by default will be taken against you, and you are hereby notified that unless you appear and plead, answer or demur, as herein required, the plaintiff will take judgment for any money or damages demanded in the complaint as arising

from contract or will apply to the Court for any further relief demanded in the complaint.

WITNESS, the Honorable Paul J. McCormick Judge of the District Court of the United States in and for the Southern District of California, this 19th day of November, in the year of our Lord one thousand nine hundred and twenty-eight and of our Independence the one hundred and fifty-third.

[Seal]

R. S. ZIMMERMAN, Clerk.
By M. L. Gaines, Deputy Clerk.

UNITED STATES MARSHAL'S OFFICE,
Southern District of California.

I HEREBY CERTIFY, that I received the within writ on the 19th day of November 1928, and personally served the same on the 19th day of November 1928, by delivering to and leaving with John E. Sutherlin, and H. L. Dunn, Agent of Sutherlin, Barry & Company, Inc., said defendant named therein, personally at the County of Los Angeles in said District, a certified copy thereof, together with a copy of the Complaint, certified to by.....attached thereto.

Marshal's Fees	$4.00
Mileage	$
Expenses	$
Total	$4.00

A. C. Sittel
U. S. Marshal.
By Charles E. Rice
Deputy.

Los Angeles, Cal.
November 19th, 1928.

[Endorsed]: Filed Nov. 21, 1928. R. S. Zimmerman, Clerk By M. L. Gaines, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

DEMURRER

Defendant, Sutherlin, Barry & Company, Inc., demurs to the complaint herein on file upon the following grounds:

I.

That said complaint does not state facts sufficient to constitute a cause of action against said defendant, Sutherlin, Barry & Company, Inc.

II.

That there is a misjoinder of parties defendant, in that said Sutherlin, Barry & Company, Inc., is made defendant in said action.

III.

That, in said complaint, several causes of action have been improperly united or not separately stated, in that said alleged complaint purports to set forth a scheme or design whereby said defendants, or either or both of them, deprived plaintiff of certain real property and also purports to state a cause of action for the alleged conversion of certain personal property and for the alleged loss of income to plaintiff from the use of said real and personal property.

IV.

That said complaint is ambiguous in that:

(a) It is impossible to ascertain therefrom whether the purported cause of action, or actions, sound in law or in equity; and

(b) It is impossible to ascertain therefrom whether the purported cause of action, or actions, set forth a claim or claims against said defendants and each of them or solely against said corporate defendant.

V.

That said complaint is uncertain in each of the respects in which it is hereinbefore alleged to be ambiguous.

WHEREFORE, this defendant prays the judgment of this Honorable Court whether this defendant shall be compelled to make further or any answer to said complaint and prays to be hence dismissed with his reasonable costs in this behalf sustained.

L. R. Martineau Jr.
Joseph L. Lewinson
Attorneys for Defendant, Sutherlin, Barry & Company, Inc.

We, Joseph L. Lewinson and L. R. Martineau, Jr., do hereby certify that we are counsel for said defendant, Sutherlin, Barry & Company, Inc., in the above-entitled action, and that in our opinion the foregoing demurrer is well founded.

L R Martineau Jr.
Joseph L Lewinson

[TITLE OF COURT AND CAUSE.]

MEMORANDUM OF AUTHORITIES IN SUPPORT OF DEMURRER OF SUTHERLIN, BARRY & COMPANY, INC., TO COMPLAINT.

Code of Civil Procedure of California, Secs. 427 and 430;

Hurt v. Hollingsworth, 100 U. S. 100, 25 L. Ed. 569;

Lindsay v. Shreveport Bank, 156 U. S. 485, 15 S. Ct. 472, 39 L. Ed. 505;

Lantry v. Wallace, 182 U. S. 536, 21 S. Ct. 878, 45 L. Ed. 1218.

L R Martineau Jr
Joseph L Lewinson
Attorneys for Defendant, Sutherlin, Barry & Company, Inc.

[Endorsed]: Received copy of the within instrument this 21st day of January 1929 Ewell D. Moore & D. A. Knapp Attorneys for Plaintiff. Filed Jan. 21, 1929. R. S. Zimmerman, Clerk, By Edmund L. Smith, Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

DEMURRER

Defendant, John E. Sutherlin, demurs to the complaint herein on file upon the following grounds:

I.

That said complaint does not state facts sufficient to constitute a cause of action against said defendant John E. Sutherlin.

II.

That there is a misjoinder of parties defendant, in that said John E. Sutherlin is made defendant in said action.

III.

That, in said complaint, several causes of action have been improperly united or not separately stated, in that said alleged complaint purports to set forth a scheme or design whereby said defendants, or said defendant corporation, deprived plaintiff of certain real property and also purports to state a cause of action for the alleged

conversion of certain personal property and for the alleged loss of income to said plaintiff from the use of said real and personal property.

IV.

That said complaint is ambiguous in that:

(a) It is impossible to ascertain therefrom whether the purported cause of action, or actions, sound in law or in equity; and

(b) It is impossible to ascertain therefrom whether the purported cause of action, or actions, set forth a claim or claims against said defendants and each of them or solely against said corporate defendant.

V.

That said complaint is uncertain in each of the respects in which it is hereinbefore alleged to be ambiguous.

WHEREFORE, this defendant prays the judgment of this Honorable Court whether this defendant shall be compelled to make further or any answer to said complaint and prays to be hence dismissed with his reasonable costs in this behalf sustained.

L R Martineau Jr
Joseph L Lewinson
Attorneys for Defendant, John E. Sutherlin.

We, Joseph L. Lewinson and L. R. Martineau, Jr., do hereby certify that we are counsel for said defendant John E. Sutherlin in the above-entitled action, and that in our opinion the foregoing demurrer is well founded.

L R Martineau Jr
Joseph L Lewinson

[TITLE OF COURT AND CAUSE.]

MEMORANDUM OF AUTHORITIES IN SUPPORT OF DEMURRER OF JOHN E. SUTHERLIN TO COMPLAINT.

Code of Civil Procedure of California, Sec. 379, 427 and 430;

Gardner v. Samuels, et al., 116 Cal., 84, 47 Pac. 935.

L R Martineau Jr
Joseph L Lewinson
Attorneys for Defendant, John E. Sutherlin.

[Endorsed]: Received copy of the within demurrer and Authorities Supporting Same this 21st day of January, 1929 Ewell D. Moore & D. A. Knapp Attorneys for Plaintiff. Filed Jan. 21, 1929 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

AFFIDAVIT.

STATE OF CALIFORNIA,)
) ss
County of Los Angeles.)

L. R. MARTINEAU, Jr., being first duly sworn, upon oath deposes and says:

That he is one of the attorneys for defendants in the above entitled cause and is personally familiar with the matters and things herein alleged; that the above entitled cause is the fifth action filed or had in the above entitled Court initiated by plaintiff against the defendants above named arising out of the same transaction or transactions

set forth in the complaint herein on file; that said actions and suits are as follows, to-wit:

(a) Low vs. Sutherlin Barry, et al, in the above entitled Court, Docket No. 2835 J, dismissed by plaintiff after having been given leave to amend by Hon. William P. James, Judge of the above entitled Court;

(b) Low vs. Sutherlin Barry, et al, in the above entitled Court, Docket No. M 83 J, dismissed on defendants' motion without leave to amend;

(c) Low vs. Sutherlin Barry & Company, et al, in the above entitled Court, Docket No. M 84 J, dismissed on defendants' motion without leave to amend;

(d) Low vs. Sutherlin Barry & Company, in the above entitled Court, Docket No. 2814 H, pending on appeal;

(e) The above entitled cause No. 3324 M;

That reference is hereby made to the records and files in the above mentioned causes of action and the same are hereby made a part of this affidavit as fully as if set forth herein in full.

L. R. Martineau Jr.

Subscribed and sworn to before me this 21st day of March, 1929.

R. S. Zimmerman, Clerk U. S. District Court, Southern District of California By Edmund L. Smith Deputy

[Endorsed]: Received copy of the within this 26 day of March 1929 E. D. Moore, D. A. Knapp, John H. Bradley Attorney for plf Filed Mar. 27, 1930. R. S. Zimmerman Clerk, by Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

COUNTER AFFIDAVIT.

STATE OF CALIFORNIA,)
(ss.
County of Los Angeles,)

EWELL D. MOORE, being first duly sworn, upon his oath deposes and says:

(1) That he is one of the attorneys for plaintiff in the above styled cause and is personally familiar with the matters and things set up in this affidavit and the affidavit of L. R. Martineau, Esq., offered in open court March 26th, 1929 in the above styled cause upon the argument of the demurrers filed therein by defendants;

(2) That the instant cause, while growing out of the matters, things and transactions upon which the said four causes were bottomed, is an entirely different cause of action than either of said four causes, and that a final judgment, in the opinion of this affiant, in either or all of said four causes, would not be a bar to recovery in the present cause which is for damages for the alleged false and fraudulent acts and representations as set out and pleaded in plaintiff's complaint;

(3) That reference is hereby made to the files of the said four causes as numbered and styled in the affidavit of the said L. R. Martineau filed herein for proof and support of the allegations made in this affidavit;

Affiant as one of counsel for plaintiff protests against the consideration of the affidavit of counsel for defendants, because it is the duty of the Court to rule the demurrer upon the complaint free from extraneous matters. In the event the affidavit of counsel for defendants is con-

sidered by the Court, this affiant and his associate counsel respectfully request that this affidavit be considered.

Ewell D. Moore

Subscribed and sworn to before me this 28th day of March, 1929.

[Seal] Anne Dunderdale

Notary Public in and for the County of Los Angeles, State of California.

21 Cal. Juris. Sec. 61 and Sec. 62, page 94.

[Endorsed]: Received copy of the within Counter Affidavit, this 29th day of March, 1929. Joseph L. Lewinson, L. R. Martineau Jr. Attorneys for Defendants. Filed Mar 29, 1929. R. S. Zimmerman, R. S. Zimmerman, Clerk.

At a stated term, to wit: The January Term, A. D. 1929 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 29th day of March in the year of our Lord one thousand nine hundred and twenty-nine.

Present:

The Honorable FRANK H. NORCROSS, District Judge.

Grace E. Low, Plaintiff,	)	
Vs.	)	
Sutherlin, Barry & Co., and John E. Sutherlin,	)	No. 3324-M Civil.
Defendants.	)	

The Demurrer of defendants are sustained upon the first ground thereof that said Complaint does not state facts sufficient to constitute a cause of action. Plaintiff is allowed twenty days in which to file an Amended Complaint

if she is so advised, and defendants are allowed twenty days to answer or otherwise plead to the Amended Complaint, if and when filed.

[TITLE OF COURT AND CAUSE.]

FIRST AMENDED COMPLAINT
(In Damages)

Leave of Court being first had and obtained, plaintiff files this her First Amended Complaint, and for cause of action against the defendants alleges:

I.

That jurisdiction of this case arises and is conferred on this Honorable Court by reason of the diversity of citizenship of the parties. That the plaintiff Grace E. Low, is a citizen of the State of California and a resident of the County of Los Angeles; that the defendant John E. Sutherlin, is a citizen of the State of Louisiana, and the defendant Sutherlin, Barry & Company, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Louisiana and authorized to and is doing business in the State of California.

II.

That on and prior to June 29, 1925, plaintiff was the owner in fee of two certain parcels of real property, one of which is situated in the City of Los Angeles, and the other in the City of Venice, both in the County of Los Angeles, State of California; the property located in Los Angeles being described as follows:

That portion of Lots 12, 13 and 14, in Block 108, of Bellevue Terrace Tract, in the City of Los Angeles,

County of Los Angeles, State of California, as per map recorded in Book 2, page 585, Miscellaneous Records of said County, described as follows:

Beginning at a point in the Northerly line of Fifth Street, distant 65 feet Easterly from its intersection with the Easterly line of Hope Street; thence Easterly along said line of Fifth Street, 85 feet to its intersection with the Westerly line of a 12 foot alley (so-called); thence along said Westerly line, Northerly and parallel with the Easterly line of said Lots 12, 13 and 14, 142 feet; thence Westerly parallel with the Northerly line of Fifth Street, 85 feet; thence Southerly 142 feet to the point of beginning;

Together with the improvements thereon consisting of a six-story and full basement, Class "A" reinforced concrete apartment hotel in good repair, having 212 rooms subdivided as follows:

Twelve (12) double apartments consisting of living room and dining room, each equipped with double disappearing beds, kitchen and bath; seventy-five (75) single apartments consisting of combination living and dining room containing one double disappearing bed; kitchen and bath; and seven (7) transient hotel rooms;

The property located in Venice being described as follows:

Lots "P" and "R" of Venice of America, in the City of Venice, County of Los Angeles, State of California, as per map recorded in Book 6, Pages 126 and 127 of Maps, in the office of the County Recorder of said County, which property consists of approximately three acres of land, and on which are located twenty-seven (27) single cottages, three (3) double cottages, one (1) store and a garage of

fourteen (14) stalls, all being of frame construction and in good state of repair;

Said property first above described is sometimes hereinafter referred to as the "Engstrum Property", and the property located in Venice is sometimes hereinafter referred to as the "Venice Property".

III.

That at all times herein mentioned defendant, Sutherlin, Barry & Company, Inc., was, and still is, a corporation engaged in the business of financing, dealing in and selling investment bonds and underwriting issues of the same, and defendant, John E. Sutherlin, at all times herein mentioned was and still is, the president and manager thereof and the principal stockholder therein, and as such carried out all of the acts and things herein complained of for and on behalf of himself and said defendant corporation.

IV.

That prior to said June 29, 1925, defendants by and through defendant John E. Sutherlin, with the intent and purpose of developing and perfecting a scheme whereby plaintiff would be wrongfully deprived of her said property and the whole thereof by defendants without any consideration whatsoever, did begin and thereafter continue a series of steps hereinafter set forth in the order and effect thereof as follows:

That as the first step in the development of said scheme aforesaid, said defendants upon their own initiative proposed to plaintiff in general terms a lending plan for the funding of the several obligations then existing against plaintiff, whereby defendant Sutherlin, Barry & Company, Inc., would take up and pay off all the then existing obligations against plaintiff's said Engstrum property, by means

of a bond issue under a Trust Indenture secured by plaintiff's said Engstrum property, said bonds to be sold to defendant Sutherlin, Barry & Company, Inc., and to be in the amount that might be found necessary to pay every obligation then existing against said Engstrum property; said bonds to bear interest at seven per cent. per annum, and to be payable as to both principal and interest in such amounts and at such periods of time over a term of years as plaintiff could safely undertake in full view of the actual and probable income of her said Engstrum property as determined by defendants. And to that end defendants proposed to plaintiff that they and each of them would utilize their wide and varied financial experience and would prepare for her a careful and conservative "set-up", upon which in all future negotiations plaintiff might safely act, as to the extent of the bond issue necessary to pay all her obligations inclusive of the interest and amortization payments on said bonds, together with all payments, charges and expenses necessary to the transaction, and at the same time defendants estimated the income which their experience and judgment and their investigation demonstrated she could and should obtain from her said Engstrum property, and represented to plaintiff that such income was reasonable and probable.

That plaintiff was without any business experience and particularly without experience as to such matters as bond issues and so stated to defendants, which fact defendants then and there well knew. That plaintiff was then and there and theretofore and at all times herein mentioned so greatly troubled by the physical collapse of her husband that she was not then possessed of even her normal ability to grasp, understand and appreciate the figures and statements presented to her by defendants, and so explained to

defendants, and that defendants conducted all of said negotiations knowing the truthfulness of plaintiff's representations of her harassment and worry as aforesaid.

V.

That as a second step in developing said scheme aforesaid, defendants by and through defendant John E. Sutherlin, did prepare and exhibit to plaintiff said "set-up", containing on the one hand the actual and probable income of plaintiff's said Engstrum property as estimated by defendants, projected over a term of years, and purporting to contain on the other hand all the charges, expenses, fees and costs, as well as the payments of interest and amortization payments to retire said bonds, over a term of fifteen years from the date of issuance thereof, all of which purported to show to plaintiff that she could safely enter into said proposal of defendants and pay all of the obligations she would assume thereunder; that thereupon and in furtherance thereof, defendants, by and through defendant John E. Sutherlin, falsely and fraudulently stated and represented to plaintiff that by reason of their said wide experience in the finance and bond business that they could and did guarantee the truth and accuracy of the said "set-up" and particularly that it contained all the charges, expenses, fees, interest, payments and costs plaintiff would be called upon to bear and to pay in said transaction; and that the money derived from the sale of said bonds would be sufficient for all the requirements of said transaction and provide a large sum additional which sum plaintiff would be required to use for the renovating and refurnishing of said Engstrum property in order that it might earn the income estimated by defendants in said set-up; that said defendants then and there well knew that in truth and

in fact there would be charges and expenses against plaintiff in said proposed transaction other than, and in addition to, the charges, expenses, fees, costs, interest and payments which said defendants had included in said "set-up" prepared by them and exhibited to plaintiff as aforesaid, and plaintiff alleges that the said set-up consisted of a series of figures and pencil memoranda on scratch paper, all prepared by defendant John E. Sutherlin acting for himself and his codefendant; that plaintiff at no time had possession of said set-up memoranda and no copy thereof was ever delivered to her, but that said set-up was designedly always retained by defendants. And plaintiff alleges that by reason of the facts last above alleged as to said set-up she is unable to be more definite and certain in regard thereto except that she alleges that the income of the said Engstrum Property as computed and stated by defendants in said set-up was greatly in excess of the income theretofore derived therefrom, and that the outlay required by defendants in order that plaintiff might safely enter into the said contemplated bond issue, as plaintiff thereafter ascertained, was greatly in excess of the amount represented in said set-up; and plaintiff further alleges that the statements and representations as to income and outlay, made by the said John E. Sutherlin for himself and for his codefendant, and contained in and based upon said set-up were false and untrue and that defendant John E. Sutherlin knew said statements and representations were false and untrue, and plaintiff alleges that she did not know that said statements and representations of defendants were false and untrue and that said John E. Sutherlin knew that plaintiff did not, and in her mental condition could not, comprehend and appreciate the im-

port and effect of said set-up and of said oral statements and representations based thereon or determine the truth thereof; and plaintiff alleges that she in good faith relied upon and acted upon the said false and fraudulent representations made by defendants in said set-up; and but for her reliance thereon would not have continued further in said negotiations.

That defendants well knew that there would not be any sum remaining after paying the charges and expenses, as aforesaid, for the use of plaintiff or to renovate and refurnish said Engstrum Property, and that defendants, by and through defendant John E. Sutherlin, made said statements and representations to plaintiff with the intent and for the purpose of deceiving and misleading plaintiff and inducing her to enter into the said transaction, and plaintiff in reliance thereon thereupon agreed to continue said negotiations with defendants on the basis of said representations and said "set-up."

VI.

That as the third step in the development of said scheme defendants on or about April 22, 1925, prepared and presented to plaintiff a writing purporting to be a proposal or offer by plaintiff to defendant Sutherlin, Barry & Company, Inc., but which in truth and in fact was defendants' proposal to plaintiff, to pay her obligations against said Engstrum Property, and to that end to issue and sell to defendant Sutherlin, Barry & Company, Inc., First Mortgage Seven Per Cent Bonds and secure the same by a Trust Indenture covering plaintiff's said Engstrum Property; and then and there defendants, by and through defendant John E. Sutherlin, falsely and fraudulently stated to plaintiff that the said writing of April 22, 1925, in its

full effect contained all of the oral proposals submitted by defendants to plaintiff as aforesaid, and in its full effect contained the substance and full purport of the said "set-up" as to the said Engstrum Property; that defendants made said statements last alleged to plaintiff knowing them to be false, with the intent and purpose of deceiving and misleading plaintiff and inducing her to execute the said writing, and knowing that plaintiff was ignorant of the true nature and effect of the statements in said purported proposal contained, and knowing also that plaintiff was wholly without financial experience and had no knowledge of the same and could not foresee the results thereof; that plaintiff relying upon defendants' oral statements and representations aforesaid, executed and delivered to defendants on said date said writing, a copy of which is attached hereto, made a part hereof, and marked Exhibit "A"; that immediately thereafter, plaintiff, in order to carry out her part of said transaction as stated by defendants and on the demands of defendants in the premises, incurred large initial expenses by virtue of defendants' said representations and of said writing (Exhibit "A") to meet which exhausted her financial resources, which defendants then and there and theretofore knew would result therefrom, and said expenses so incurred left plaintiff financially helpless to resist any further demands that might be made upon her in connection therewith, which fact defendants at all times had foreseen and calculated upon as a means to the ends hereinbefore alleged.

VII.

That thereafter, and as the fourth step in further developing said scheme aforesaid and in conversation between plaintiff and defendant John E. Sutherlin acting for

and in behalf of himself and defendant Sutherlin, Barry & Company, Inc., it was orally agreed that the transaction under Exhibit "A" should be enlarged and extended to include plaintiff's said Venice real property, upon the same terms and conditions set forth in said "set-up," and in said proposal of April 22, 1925, (Exhibit "A") except as to the amount of the bonds to be issued and the interest and amortization payments thereon;

That thereafter, and on June 29, 1925, and subsequent to the incurring of heavy costs, expenses, charges and fees by plaintiff, as aforesaid, including the costs, expenses, charges and fees incurred by plaintiff incident to the inclusion therein of her said Venice Property as aforesaid, defendants, contrary to their express promises, statements and representations to plaintiff aforesaid, suddenly and on said June 29, 1925, demanded of plaintiff the payment of $5900.00 in addition to and in excess of all other charges, costs, fees, expenses, interest and payments theretofore provided to be paid by her under said "set-up," and said proposal of April 22, 1925 (Exhibit "A"); that upon plaintiff's protests against said demand defendants, by and through defendant John E. Sutherlin, stated to plaintiff that unless she then and there agreed to pay said $5900.00 defendants would immediately withdraw from said transaction in which event all the costs, expenses, charges and fees theretofore incurred by plaintiff as aforesaid, would be upon her shoulders; that by reason of said demand of defendants and the said large expenses, charges and fees theretofore incurred as aforesaid, and by reason of the fact that she had then pressing upon her the obligations of sundry creditors, the payment of whom could not be delayed to await some other plan of refinancing, plaintiff

was placed in a desperate and helpless financial situation, and in consequence thereof was forced to, and in conformity to defendants' scheme aforesaid, did accede to defendants' demands and signed the writing prepared and presented to her by defendants, agreeing to pay defendants said sum of $5900.00, by therein authorizing said sum to be deducted from the proceeds of said bond issue, a copy of which said writing is attached hereto, made a part hereof and marked Exhibit "B". That in so doing however, defendants falsely and fraudulently stated to plaintiff that the payment of said $5900.00 would be postponed until the excess of the proceeds from the sale of said bonds permitted the same to be paid without jeopardizing her financial safety in the premises.

That on said June 29, 1925, defendants, by and through defendant John E. Sutherlin, presented to plaintiff a further and second proposal previously prepared by said defendants, addressed to defendant Sutherlin, Barry & Company, Inc., enlarging and extending the said proposal of April 22, 1925, (Exhibit "A") to include plaintiff's said Venice real property as well as her said Engstrum Property, and providing for a Trust Indenture and the issuance of bonds thereunder in the sum of $360,000.00, which plaintiff then and there executed and delivered to defendants, a copy of which is attached hereto, made a part hereof, and marked Exhibit "C".

VIII.

That prior to executing the said second proposal (Exhibit "C") as aforesaid, and on said June 29, 1925, plaintiff called the attention of defendants, and particularly of defendant John E. Sutherlin, to the provisions therein contained as to the insurance required to be placed and paid

for by plaintiff upon her said Engstrum and Venice Properties, and stated to said defendants that the insurance requirements therein set forth appeared to be in excess of the amount provided for in the said "set-up" as prepared by defendants and exhibited to plaintiff as aforesaid; that thereupon defendants, and particularly defendant John E. Sutherlin, falsely and fraudulently stated to plaintiff that the insurance then in force, and then paid for by plaintiff, upon all of her said properties, would be sufficient to meet the defendants' requirements in the premises, and that there would be no necessity for further insurance thereon except in a small amount, the cost of which would be paid out of the excess from said sale of said bonds over and above all the other costs, expenses, fees and payments provided for in said Trust Indenture, and that said additional costs for such additional insurance would be merely nominal, the payment of which would not work a hardship upon plaintiff, and that by reason of the fact that said expense for said additional insurance would be merely nominal, plaintiff would not only be able to pay the same from the aforesaid proceeds from the sale of said bonds but that plaintiff would also receive a substantial balance from the said proceeds of said sale of said bonds from which said balance plaintiff could pay all of the charges and expenses, and also pay the costs of the repairs, improvements and redecorations as provided in said proposal of June 29, 1925 (Exhibit "C") as well as the interest on said bonds as they became due; that plaintiff in reliance upon said statements and representations of defendants as aforesaid, was induced to and did execute the said proposal of June 29, 1925, (Exhibit "C") and did proceed to the further consummation of said transaction;

That notwithstanding said statements and representations of defendants to plaintiff as aforesaid, defendants then and there secretly agreed to and thereafter did saddle upon plaintiff additional insurance charges in the amount of $3,275.95; that there was no balance due plaintiff from the sale of said bonds with which to pay said additional insurance charges and that said defendants and each of them at all times herein mentioned well knew that there would be no balance, and well knew that said charges for said additional insurance could not be paid by plaintiff from any balance from the sale of said bonds, and well knew that said charges for said additional insurance if unpaid by plaintiff would go far toward creating a default by plaintiff by reason of which defendants could bring about the sale of plaintiff's said properties to defendant Sutherlin, Barry & Company, Inc; that said representations of defendants aforesaid were in direct contravention to the representations theretofore made by defendants to plaintiff, as aforesaid.

IX.

That thereafter, and as the fifth step in the aforesaid scheme, defendants prepared and by defendant John E. Sutherlin, submitted to plaintiff a form of Trust Indenture covering all of plaintiff's said real property herein described, and at or about the same time prepared and presented to plaintiff, and which plaintiff executed, an application to the Corporation Commissioner of the State of California for a permit to issue and sell to defendant Sutherlin, Barry & Company, Inc., the bonds provided for under said Trust Indenture in the sum of $360,000, and defendants thereupon placed the entire transaction in escrow with the Citizens Trust & Savings Bank of Los Angeles, California, the Trustee named in said Trust In-

denture. That thereafter, and upon August 12, 1925, a permit was issued by said Corporation Commissioner authorizing plaintiff to sell and issue to defendant Sutherlin, Barry & Company, Inc., said bonds in said amount of $360,000 at ninety cents on the dollar, all subject to and under the conditions of the said Trust Indenture, a copy of which is attached hereto, made a part hereof and marked Exhibit "D".

That the said application for said permit to issue and sell said bonds was prepared by defendants and that the entire proceedings thereto pertaining were carried on by said defendants, all without knowledge of plaintiff as to the details or practical purport thereof, and that said defendants at all times herein mentioned well knew that plaintiff did not have knowledge of such details or appreciate the practical purport thereof, and particularly that she had no comprehension or understanding of the ultimate effect of said permit, to-wit: that the sale of said bonds thereunder would result in a bonus to defendant Sutherlin, Barry & Company, Inc., in the sum of $36.000 and that plaintiff would thus be deprived of said sum from the proceeds of the sale of said bonds; that at all times defendants well knew that plaintiff believed and understood that she was merely borrowing the money from defendant, Sutherlin, Barry & Company, Inc, and that said bonds were her promise to pay and that she believed her transaction was personal to defendants and subject to no bonus nor charges save as any private loan under the statutes made and provided might be subjected.

X.

That as the sixth step in the development of said scheme aforesaid and on September 23, 1925, and at the time fixed

for the closing of said escrow at said Citizens Trust & Savings Bank, and at which time the said Trustee had notified the parties hereto that there would be a balance of but Fifty Dollars in favor of plaintiff from the proceeds of the sale of said bonds to defendant Sutherlin, Barry & Company, Inc. after meeting the charges, costs, expenses and fees in said transaction incurred, (the Trustee not referring however, to the insurance charges set up in paragraph VIII. herein) said defendants, well knowing plaintiff had no means so to do and in direct contravention to their promises theretofore to plaintiff made and upon which she relied, by and through defendant John E. Sutherlin suddenly demanded of plaintiff the immediate and unconditional payment of the said sum of $5,900.00 heretofore referred to, and defendants then and there by and through defendant John E. Sutherlin, declared that unless said $5,900.00 was immediately settled by plaintiff in the manner and form by them demanded, they, the defendants, would refuse to go further in said transaction and would leave to plaintiff the payment of all the charges, expenses and costs theretofore provided for in said proposal of June 29, 1925, which plaintiff had incurred in good faith, and any and all other items of expense charged or chargeable to plaintiff in the premises; that the manner and form of settlement of said charge of $5,900.00 thus demanded by defendants was as follows: that plaintiff execute two promissory notes in the sum of $2,950.00 each, payable in 90 and 120 days respectively, with interest thereon at 7% and 6% respectively, per annum; that plaintiff being driven by the extremities of her financial condition by long deferred debts to creditors to which she would be subject to drastic measures, all of which defendants well knew

and had carefully contemplated from the beginning, and solely by reason of the facts hereinabove set forth thereupon did execute and deliver said two promissory notes to defendants.

That thereafter defendant Sutherlin, Barry & Company, Inc., sold one of said promissory notes to a purported innocent purchaser who sued plaintiff thereon, and garnished a large number of plaintiff's tenants occupying said Engstrum Property, thereby resulting in the vacating by such persons of plaintiff's said premises and the consequent and continuing curtailment of plaintiff's income therefrom;

That at all times herein mentioned defendants intended, designed and contemplated the results of their aforesaid acts, to-wit: that plaintiff would be deprived of a large part of her ordinary income from her said Engstrum Property and would be unable to increase the income of the said property in accordance with the said set-up; that defendants well knew by reason thereof plaintiff would default in the payment of the charges and expenses under said Trust Indenture and the interest on said bonds, and thereby would provide defendants with an excuse to declare a default thereunder and to demand that said Trustee sell all of plaintiff's said properties under said Trust Indenture, in order that defendant Sutherlin, Barry & Company, Inc. might buy said properties at said sale and secure the same to themselves without consideration to plaintiff for her interest therein.

That said results to plaintiff did in fact follow the aforesaid acts of defendants and plaintiff was in fact thereby deprived of a large part of her income theretofore received from said Engstrum Property and was utterly un-

able to inaugurate new plans for increasing the same: that plaintiff was in fact prevented from paying the charges, costs and expenses placed against her by defendants in connection with said transaction aforesaid, and was in fact thereby prevented from paying the interest on said bonds as and when the same became due, and plaintiff, as a consequence thereof, was thereby and thereafter deprived of her said real property and the whole thereof, as the same existed in her prior to the said June 29, 1925.

XI.

That as the seventh step in the aforesaid scheme, defendant Sutherlin, Barry & Company, Inc., on December 23, 1925, notified plaintiff in writing that unless certain insurance premiums upon the additional insurance defendants required plaintiff to place upon her said property as aforesaid, were not immediately paid by plaintiff by way of reimbursement to the said Citizens Trust & Savings Bank, the Trustee, then the said defendant Sutherlin, Barry & Company, Inc. would at once elect to request said Trustee to declare the entire principal sum of said bonds, to-wit, $360,000, due and payable and would take further steps appropriate in the premises; that said defendants and each of them well knew at the time of making said demand upon plaintiff, and well knew from the beginning of said transaction, that their said manipulations of the entire transaction affecting plaintiff's said properties under said Trust Indenture had made it impossible for plaintiff to immediately pay said insurance charges or to immediately pay the other charges, costs and expenses placed against plaintiff as aforesaid, or to immediately pay the interest then accruing on said bonds;

That thereafter and on March 1, 1926, the said Trustee, pursuant to the demand of said defendant Sutherlin, Barry & Company, Inc., served written notice upon plaintiff declaring plaintiff in default under the terms of said Trust Indenture, and further declaring the entire principal of said bonds, to-wit, $360,000.00 immediately due and payable.

XII.

That thereafter and as the eighth step in furtherance of said scheme, defendants prepared a form of proposal in writing purporting to be from plaintiff to defendant Sutherlin, Barry & Company, Inc., a copy of which is attached hereto and marked Exhibit "E"; which said proposal defendant John E. Sutherlin presented to plaintiff on June 4, 1926, and plaintiff, in reliance upon the statements of said defendant John E. Sutherlin as to the purport and effect thereof upon plaintiff's rights and interest in said properties, and induced wholly by said statements, did thereupon execute and deliver to defendants said proposal on said date, and defendant John E. Sutherlin accepted the same for and on behalf of defendant Sutherlin, Barry & Company, Inc. That said statements of defendant John E. Sutherlin made to plaintiff on said date and prior to her signing said proposal were: That if plaintiff in good faith would place and keep a manager at all times to be satisfactory to defendants, in charge of all of said real, and her personal property, said personal property consisting of the furniture and equipment upon said Engstrum Property, and surrender all of said property to the use of defendants to and until August 5th, 1926, and also would surrender to defendants all of the income therefrom, and cause all of her said personal property in or upon said real

property to be subjected to the same general lien created by said Trust Indenture, and reimburse defendants for alleged attorneys' fees in the amount of $1200.00, defendants would as consideration therefor credit the said income from said properties to the payment requirements under the said Trust Indenture, and on said August 5, 1926, would cause the Trustee to postpone the sale of said real property then pending to October 6, 1926, and also would cause the said declaration of said Trustee accelerating the maturity of said bonds to be rescinded and thus restore the said real property to its former status under said Trust Indenture, provided, plaintiff would pay to the said Trustee prior to October 6, 1926, all of the sums necessary to cure the default theretofore declared to exist in said Trustee's notice, together with all charges, costs and expenses accrued at the date of such payment.

That plaintiff thereafter in good faith and in reliance on defendants' said promise and statements in the premises did all and singular the things by defendants stated that she would be required to do in order to secure a postponement of the sale of her said real property to October 6, 1926, including the placing of defendants' manager in charge of her said personal and real property and surrendering the income therefrom to defendants; but defendants thereafter in direct contravention of their said statements, representations and promises on said August 5, 1926, and at all times thereafter, failed and refused to cause the said Trustee to postpone the sale of said real property to October 6, 1926, and failed and refused to cause the Trustee to rescind its said declaration accelerating the maturity of the entire principal of said bonds and to restore said real property to the status existing prior

to said declaration of default under said Trust Indenture, all in spite of the fact that plaintiff upon the 12th day of August 1926, and prior to the sale of said properties had on said day, procured and presented to defendants a person, viz., Rodolfo Montes, ready, able and willing then and there and on said date, to pay to said Trustee all charges, costs, expenses and interest, except the principal sum of said bonds, declared by said Trustee to be due from plaintiff under said Trust Indenture or otherwise charged against her in the premises, and plaintiff alleges that the said Rodolfo Montes for and in behalf of plaintiff on August 12, 1926, and prior to the sale under the Trust Indenture, offered to pay all of the alleged delinquencies and defaults, except the principal sum of said bonds, if the sale would be postponed for one hour after 10 o'clock A. M. on said August 12, 1926, so as to give the said Montes an opportunity to get the money from his bank which did not open for business until 10 o'clock, but plaintiff alleges that the said John E. Sutherlin after knowing that the said Montes was ready, able and willing to make said payment and after having talked with said Montes in regard thereto, refused to direct or request the Trustee to postpone the sale for a few minutes in order to give the said Montes time to get the money from his bank, but instead directed the Trustee to proceed with the sale promptly at 10 o'clock which was done in spite of the great loss and damage which came to plaintiff by reason of such unreasonable and unwarranted conduct on the part of defendants, and in spite of the offer of the said Montes.

And plaintiff further alleges that at the time defendants by and through defendant John E. Sutherlin made said false and fraudulent representations to plaintiff, to-wit, on

June 4, 1926, relative to the postponement of said sale, defendants did not intend to postpone said Trustee's sale to October 6, 1926, and did not intend to cause the Trustee to rescind its said declaration accelerating the maturity of the entire principal of said bonds, and did not intend to cause said Trust Indenture to be restored to its original force and effect; and defendants and each of them well knew plaintiff relied upon their said false and fraudulent statements and representations of defendants relative to the postponement of said sale to October 6, 1926, as aforesaid; that plaintiff would not have surrendered the control of said real and personal property and the income therefrom as aforesaid, save and except in her said reliance upon the representations of defendants that said postponement of said sale to said October 6, 1926, would be made.

XIII.

That at the time defendants made said false and fraudulent statements and representations to plaintiff as aforesaid, to-wit, on June 4, 1926, they, and each of them, well knew that in the event and upon the placing of the said manager, who in truth and in fact was the manager for defendant Sutherlin, Barry & Company, Inc., in charge of plaintiff's said property and allowing him to collect and take the income therefrom for said defendant Sutherlin, Barry & Company, Inc., that plaintiff would thereafter be thwarted and prevented from receiving her customary and usual income therefrom, and, said defendants and each of them purposed and intended at the time they made said false and fraudulent representations that plaintiff should never again come into control of her said real and personal property; that defendant Sutherlin, Barry & Company, Inc., upon the placing of said manager in control of plain-

tiff's said property and the income therefrom, so manipulated the same and so harassed and obstructed plaintiff that she was forced to, and did move off her said property and never thereafter came into possession of the same or of any income therefrom.

That defendants in utter disregard of their said agreement of June 4, 1926, to postpone the sale of said real property to October 6, 1926, as aforesaid, caused said sale to be postponed only to August 12, 1926, and did then and there and on said last date mentioned, cause said real property to be sold by said Trustee to defendant Sutherlin, Barry & Company, Inc.; that said sale was designed by said defendants to be held, and was in truth and in fact so held without opposing bidders and without an opportunity for opposing bidders to be present.

Plaintiff alleges that the first notice of declaration by Trustee of acceleration of principal sum of said bonds was served upon her April 5, 1926, and that the sale under said declaration was noticed for May 25, 1926; that the sale so noticed for May 25, 1926, was postponed to June 1, 1926, and again to June 8, 1926, and again to August 1, 1926, and then to August 12, 1926, at which time said sale was had as hereinbefore alleged. And plaintiff alleges that after the initial notice no further formal notice was by the Trust Indenture required, in the event the sale was postponed from the date fixed in the initial notice, but that postponements without further formal notice could be and were made by the Trustee who at all times proceeded according to the direction of defendants. And plaintiff states that it is her belief and therefore she alleges that defendants by and through defendant John E. Sutherlin, while pretending to be directing and consenting to the postpone-

ments in order to accomodate and assist plaintiff, were in fact directing and consenting to said postponements in order to hit upon a time and an occasion when there would be no opposing bidders present at the sale, which was accomplished as hereinbefore alleged.

Plaintiff further alleges that said defendants in utter violation of good faith and well knowing that the valuation of plaintiff's said real property as fixed in the appraisal caused to be made by defendant Sutherlin, Barry & Company, Inc., was in excess of $650,000, caused said real property to be sold by said Trustee to defendant Sutherlin, Barry & Company, Inc., and defendant Sutherlin, Barry & Company, Inc., purchased said property at said sale for $292,500. And plaintiff alleges that on August 12, 1926, the date when said properties were sold under the Trust Indenture said properties were of the reasonable value of $750,000, and that defendant Sutherlin, Barry & Company, Inc. purchased said real property at said sale at the aforesaid price of $292,500, with the intent and for the purpose of thereafter, and at its convenience, filing suit and obtaining a deficiency judgment against plaintiff in the premises, and of executing such judgment upon said personal property and the whole thereof, to the end that said defendant Sutherlin, Barry & Company, Inc. might secure to itself said personal property without consideration to plaintiff therefor.

XIV.

That at all times hereinbefore mentioned plaintiff was the owner of all and singular the personal property in and upon the real property herein described, to-wit, the said Engstrum and said Venice Properties; that said personal property consisted of complete household furniture, fur-

nishings and equipment ordinarily required and used in the apartment house and hotel business; that said furniture, furnishings and equipment was of the reasonable actual value to plaintiff of the sum of $60,000.

That defendant Sutherlin, Barry & Company, Inc. ever since taking possession of said personal property as aforesaid, has exercised the rights of ownership therein and as plaintiff is informed and believes, and therefore alleges, has sold and otherwise disposed of said personal property and the whole thereof, all to plaintiff's damage in the sum of $60,000.

XV.

That plaintiff heretofore demanded of defendants and each of them the return to plaintiff of said real and personal property and the whole thereof, or the value thereof, but defendants and each of them have ever refused and still refuse to return the same or any part thereof, and/or to pay to plaintiff the value or any part of the value thereof.

XVI.

That by reason of the said false and fraudulent promises and representations of defendants and each of them, and by reason of the said failure and refusal of defendants to carry out the said agreements as hereinbefore set forth, and by reason of the carrying out of their said general fraudulent scheme to deprive plaintiff of her said real property in the manner aforesaid, plaintiff was thereby deprived of all of her interest in said real property as the same existed prior to said June 29, 1925, all to her damage in the sum of $750,000, less the sum of $300,000 paid thereon by defendant Sutherlin, Barry & Company, Inc., in behalf of plaintiff, or the net sum of $450,000; together with the value of plaintiff's said personal property in the sum of $60,000 as aforesaid, or the total sum of $510,000.

WHEREFORE, plaintiff prays judgment against the defendants and each of them in the sum of Five Hundred and Ten Thousand Dollars ($510,000) with interest at seven per cent from August 12, 1926, and for her costs of suit herein.

Ewell D. Moore
D. A. Knapp and
John H. Bradley
Attorneys for Plaintiff.

STATE OF CALIFORNIA,)
(ss.
County of Los Angeles,)

GRACE E. LOW, being by me first duly sworn, deposes and says: that she is the plaintiff in the above entitled action; that she has read the foregoing First Amended Complaint and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

Grace E. Low

Subscribed and sworn to before me this 12th day of April, 1929.

[Seal] J. Edwin Simpson
Notary Public in and for the County of Los Angeles, State of California.

[TITLE OF COURT AND CAUSE.]

STIPULATION

It is hereby stipulated and agreed, by and between the attorneys for the parties to the above entitled cause, that

all of the exhibits attached to, made a part of and filed with the original complaint herein, need not be again filed with the first amended complaint herein, but may be considered as the exhibits referred to in the first amended complaint as "A," "B," "C," "D" and "E" respectively, and a part of said complaint.

Dated April 10th, 1929.

EWELL D. MOORE
D. A. KNAPP
and
JOHN H. BRADLEY
Attorneys for Plaintiff.
JOSEPH L. LEWINSON
and
L. R. MARTINEAU JR.
Attorneys for Defendants.

[Endorsed]: Received copy of the within first Amended Complaint this 13th day of April, 1929. L. R. Martineau Jr., Joseph L. Lewinson Attorneys for defendants. Filed Apr 13 1929 R. S. Zimmerman, Clerk By M L Gaines Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

DEMURRER OF SUTHERLIN, BARRY & COMPANY, INC.

Comes now the defendant Sutherlin, Barry & Company, Inc., and demurs to plaintiff's first amended complaint herein on file upon the following grounds:

I.

That said first amended complaint does not state facts sufficient to constitute a cause of action against said defendant, Sutherlin, Barry & Company, Inc.

II.

That there is a misjoinder of parties defendant, in that said Sutherlin, Barry & Company, Inc., is made defendant in said action.

III.

That, in said first amended complaint, several causes of action have been improperly united or not separately stated, in that said alleged first amended complaint purports to set forth a scheme or design whereby said defendants, or either or both of them, deprived plaintiff of certain real property and also purports to state a cause of action for the alleged conversion of certain personal property.

IV.

That said first amended complaint is ambiguous in that:

(a) It is impossible to ascertain therefrom whether the purported cause of action, or actions, sound in law or in equity; and

(b) It is impossible to ascertain therefrom whether the purported cause of action, or actions, set forth a claim or claims against said defendants and each of them or solely against said corporate defendant.

V.

That said first amended complaint is uncertain in each of the respects in which it is hereinbefore alleged to be ambiguous.

WHEREFORE, this defendant prays the judgment of this Honorable Court whether this defendant shall be compelled to make further or any answer to said first amended

complaint and prays to be hence dismissed with its reasonable costs in this behalf sustained.

Joseph L. Lewinson
L R Martineau, Jr.,
Attorneys for Defendant, Sutherlin, Barry & Company, Inc.

We, Joseph L. Lewinson and L. R. Martineau, Jr., do hereby certify that we are counsel for said defendant, Sutherlin, Barry & Company, Inc., in the above-entitled action, and that in our opinion the foregoing demurrer is well founded.

Joseph L. Lewinson
L. R. Martineau Jr.

[TITLE OF COURT AND CAUSE.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER OF SUTHERLIN, BARRY & COMPANY, INC., TO FIRST AMENDED COMPLAINT

I.

The amended complaint does not state facts sufficient to constitute a cause of action against the defendant Sutherlin, Barry & Company, Inc:

1. Every private transaction is presumed to be fair, regular and free from fraud, a presumption which approximates in strength that of innocence of crime.

California Code of Civil Procedure, Sec. 1963, Par. 19;

Everett v. Standard Accident Ins. Co., 45 Cal. App. 332, 187 Pac. 996;

Lyders v. Wilsey, 271 Pac. 383.

2. A demurrer does not admit facts pleaded which appear unfounded by a record incorporated or referred to in the pleading; where the complaint is at variance with material facts set out in the exhibits attached thereto, the latter control.

31 Cyc. 337;

Murray v. Murphy, 39 Miss. 214;

Williams v. Hanly, 116 Ind. App. 464, 45 N. E. 622;

Bush v. Madeira's Heirs, 14 B. Mon. 172, 53 Ky. 212;

Tec. Bi & Co., v. Chartered Bank of India, Australia and China, 41 Philippine Reports 596;

State v. Risty, 213 N. W. 952;

Anderson v. Inter-river Drainage Dist., 274 S. W. 448.

3. General charges of fraud are worthless; the facts constituting fraud must be alleged with great particularity and exactitude.

Church v. Swetland, 243 Fed. 289 (C. C. A. 2nd);

Cella v. Brown, 144 Fed. 742 (C. C. A. 8th);

Johnson v. Fletcher, 58 C. A. D. 674;

A. Plaintiff should have alleged definitely the items and amounts which she claimed were omitted from the "set-up" in order that their materiality might be ascertained.

Kranz v. Lewis, 100 N. Y. S. 674.

4. The mere existence of a scheme to defraud is not actionable in the absence of specific fraudulent acts.

Brown v. Wohlke, 166 Cal. 121, 135 Pac. 37;

Prudential Ins. Co. v. Mohr, 185 Fed. 936.

The mere fact that a lawful act is done with a dishonest or fraudulent motive, does not make the act unlawful; motive is immaterial.

Pollock on Torts, 2nd Ed. p. 23.

5. Mere expressions of opinion or representations promissory in character or relating to future events are not actionable.

Sawyer v. Prickett, 19 Wall. 146, 22 L. Ed. 105;
Kimber v. Young, 137 Fed. 744 (C. C. A. 8th);
Mandelbaum v. Goodyear Tire Co., 6 Fed. (2nd) 818, (C. C. A. 8th);
Pigott v. Graham, 93 Pac. 435, 48 Wash. 348, 14 L. R. A. (N. S.) 1176.

A. This is particularly true where the opinions expressed related to plaintiff's ability to do certain things.

Schwitters v. Des Moines Commercial College, 199 Ia. 1058, 203 N. W. 265.

B. It is also particularly true where the opinions expressed related to matters susceptible to the test of simple mathematical computation.

Henry v. Continental Bldg., & Loan Ass'n., 156 Cal. 667, 105 Pac. 960;
Keithley v. Mutual L. Ins. Co., 271 Ill. 584, 111 N. E. 503;
Warren v. Federal L. Ins. Co., 198 Mich. 342, 164 N. W. 449;
Donoho v. Equitable L. Ass. Soc., 22 Tex. Civ. App. 192, 54 S. W. 645

C. The subject of the alleged misrepresentations being simple matters which anyone could find out for himself upon the slightest investigation, it became the duty of

plaintiff to avail herself of the means of informing herself; not having done so, she has only herself to blame.

2 Kent. Comm. 484;

Slaughter v. Gerson, 13 Wall 379, 20 L. Ed. 627;

Beckley v. Archer, 74 Cal. App. 598, 241 Pac. 422.

6. Even though fraud were alleged, plaintiff by her conduct has waived it.

12 Cal. Jur. 792.

A. When plaintiff discovered the alleged fraud, it became her duty, if she intended to go on with the contract, to deal at arm's length with the defendants; instead of that she asked and obtained favors and extensions to which she was not legally entitled; by this conduct she affirmed the contract, and waived the fraud.

Schmidt v. Mesmer, 116 Cal. 267, 48 Pac. 54;

Hunt v. Field, 81 Cal. App. 575, 254 Pac. 594;

Ball v. Warner, 80 Cal. App. 427, 251 Pac. 427;

Holcomb & Hohe Mfg. Co. v. Jones, 228 Pac. 568.

Monahan v. Watson, 61 Cal. App. 417, 214 Pac. 1001;

Tucker v. Beneke, 180 Cal. 588, 182 Pac. 299;

Blydenburgh v. Welsh, 3 Fed. Cas. 771; Case No. 1583;

Schagun v. Scott Mfg. Co., 162 Fed. 209.

B. After plaintiff discovered the alleged fraud she made a new contract with respect to the subject matter and thus waived the fraud.

Lee v. McClelland, 120 Cal. 147;

Ruhl v. Mott, 120 Cal. 668.

C. The contract being largely executory at the time of the discovery of the alleged fraud, plaintiff should have taken action at once; by choosing to go on with the contract, she waived the fraud.

Kingman Co. v. Stoddard, 85 Fed. 740;

Simon v. Goodyear Met. Rubber S., Co., 105 Fed. 573;

Bement v. La Dow, 66 Fed. 185.

7. Plaintiff cannot avail herself of the excuse that she did not read the instruments or could not understand the transaction.

Dale v. Dale, 262 Pac. 339;

Uptown v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203;

Chicago Rye Co. v. Belliwith, 83 Fed. 437 (C. C. A. 8th);

Kimmell v. Skelly, 130 Cal. 555.

8. The plaintiff did not rely upon representations alleged relative to the "set-up" because said "set-up" was merged into the loan agreement and trust indenture.

Van Weel v. Winston, 115 U. S. 228, 29 L. Ed. 384;

Andrus v. Smelting Co., 130 U. S. 643, 32 L. Ed. 1054;

Henry v. Bldg., & Loan Ass'n., 156 Cal. 667.

II.

Misjoinder of parties defendant:

Code of Civil Procedure of California, Sec. 430;

Hurt v. Hollingsworth, 100 U. S. 100, 25 L. Ed. 569;

Lindsay v. Shreveport Bank, 156 U. S., 485, 39 L. Ed. 505;

Lantry v. Wallace, 182 U. S. 536, 45 L. Ed. 1218.

III.

Several alleged causes of action are improperly united:

Code of Civil Procedure of California, Section 427.

IV.

The demurrer should be sustained without leave to amend:

Demartini v. Marini, 45 Cal. App. 418, 187 Pac. 985;

Goebel v. Gregg, 57 Cal. App. 651, 207 Pac. 917;

Reios v. Mardis, 18 Cal. App. 276, 122 Pac. 1091;

Loeffler v. Wright, 13 Cal. App., 224; 232-233;

San Joaquin, etc., Co. v. County of Stanislaus, 155 Cal. 21, 29;

Bell v. Bank of Calif., 153 Cal., 234, 244-5;

Foss v. Peoples Etc. Co. 89 N. E. 356 (Ill. Sup.)

Respectfully submitted,

Joseph L Lewinson
L R Martineau
Attorneys for Defendant, Sutherlin, Barry & Company, Inc.

[Endorsed]: Received copy of the within Demurrer and Brief. this 3 day of May 1929 E. D. Moore, D. A. Knapp & John H. Bradley Attorneys for Plaintiff. Filed May 3 1929. R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

DEMURRER OF JOHN E. SUTHERLIN.

Comes now the defendant John E. Sutherlin and demurs to plaintiff's first amended complaint herein on file on the following grounds:

I.

That said first amended complaint does not state facts sufficient to state a cause of action against said defendant John E. Sutherlin.

II.

That there is a misjoinder of parties defendant, in that said John E. Sutherlin is made defendant in said action.

III.

That, in said first amended complaint, several causes of action have been improperly united or not separately stated, in that said alleged first amended complaint purports to set forth a scheme or design whereby said defendants, or either or both of them, deprived plaintiff of certain real property and also purports to state a cause of action for the alleged conversion of certain personal property.

IV.

That said first amended complaint is ambiguous in that:

(a) It is impossible to ascertain therefrom whether the purported cause of action, or actions, sound in law or in equity; and

(b) It is impossible to ascertain therefrom whether the purported cause of action, or actions, set forth a claim or claims against said defendants and each of them or solely against said corporate defendant.

V.

That said first amended complaint is uncertain in each of the respects in which it is hereinbefore alleged to be ambiguous.

WHEREFORE, this defendant prays the judgment of this Honorable Court whether this defendant shall be compelled to make further or any answer to said first amended complaint and prays to be hence dismissed with his reasonable costs in this behalf sustained.

Joseph L Lewinson
L R Martineau Jr
Attorneys for Defendant, John E. Sutherlin.

We, Joseph L. Lewinson and L. R. Martineau, Jr., do hereby certify that we are counsel for said defendant, John E. Sutherlin, in the above-entitled action, and that in our opinion the foregoing demurrer is well founded.

Joseph L Lewinson
L R Martineau Jr

[TITLE OF COURT AND CAUSE.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER OF JOHN E. SUTHERLIN, TO FIRST AMENDED COMPLAINT.

I.

The amended complaint does not state facts sufficient to constitute a cause of action against the defendant, John E. Sutherlin:

1. Every private transaction is presumed to be fair, regular and free from fraud, a presumption which approximates in strength that of innocence of crime.

California Code of Civil Procedure, Sec. 1963, par. 19;

Everett v. Standard Accident Ins. Co., 45 Cal. App. 332, 187 Pac. 996;

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2. A demurrer does not admit facts pleaded which appear unfounded by a record incorporated or referred to in the pleading; where the complaint is at variance with material facts set out in the exhibits attached thereto, the latter control.

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3. General charges of fraud are worthless; the facts constituting fraud must be alleged with great particularity and exactitude.

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A. Plaintiff should have alleged definitely the items and amounts which she claimed were omitted from the "set-up" in order that their materiality might be ascertained.

Kranz v. Lewis, 100 N. Y. S. 674.

4. The mere existence of a scheme to defraud is not actionable in the absence of specific fraudulent acts.

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The mere fact that a lawful act is done with a dishonest or fraudulent motive, does not make the act unlawful; motive is immaterial.

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Pigott v. Graham, 93 Pac. 435, 48 Wash. 348, 14 L. R. A. (N. S.) 1176.

A. This is particularly true where the opinions expressed related to plaintiff's ability to do certain things.

Schwitters v. Des Moines Commercial College, 199 Ia. 1058, 203 N. W. 265.

B. It is also particularly true where the opinions expressed related to matter susceptible to the test of simple mathematical computation.

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Keithley v. Mutual L. Ins. Co., 271 Ill. 584, 111 N. E. 503;

Warren v. Federal L. Ins. Co., 198 Mich. 342, 164 N. W. 449;

Donoho v. Equitable L. Ass. Soc., 22 Tex. Civ. App. 192, 54 S. W. 645.

C. The subject of the alleged misrepresentations being simple matters which anyone could find out for himself upon the slightest investigation, it became the duty of plaintiff to avail herself of the means of informing herself; not having done so, she has only herself to blame.

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Slaughter v. Gerson, 13 Wall 379; 20 L. Ed. 627;

Beckley v. Archer, 74 Cal. App. 598, 241 Pac. 422.

6. Even though fraud were alleged, plaintiff by her conduct has waived it.

12 Cal. Jur. 792.

A. When plaintiff discovered the alleged fraud, it became her duty, if she intended to go on with the contract, to deal at arm's length with the defendants; instead of that she asked and obtained favors and extensions to which she was not legally entitled; by this conduct she affirmed the contract, and waived the fraud.

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Blydenburgh v. Welsh, 3 Fed. Cas. 771; Case No. 1583;

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B. After plaintiff discovered the alleged fraud she made a new contract with respect to the subject matter and thus waived the fraud.

Lee v. McClelland, 120 Cal. 147;

Ruhl v. Mott, 120 Cal. 668.

C. The contract being largely executory at the time of the discovery of the alleged fraud, plaintiff should have taken action at once; by choosing to go on with the contract, she waived the fraud.

Kingman Co. v. Stoddard, 85 Fed. 740;

Simon v. Goodyear Met. Rubber S., Co., 105 Fed. 573;

Bement v. La Dow, 66 Fed. 185.

7. Plaintiff cannot avail herself of the excuse that she did not read the instruments or could not understand the transaction.

Dale v. Dale, 262 Pac. 339;

Uptown v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203;

Chicago Rye Co. v. Belliwith, 83 Fed. 437 (C. C. A. 8th);

Kimmell v. Skelly, 130 Cal. 555.

8. The plaintiff did not rely upon representations alleged relative to the "set-up" because said "set-up" was merged into the loan agreement and trust indenture.

Van Weel v. Winston, 115 U. S. 228, 29 L. Ed. 384;

Andrus v. *Smeltin* Co., 130 U. S. 643, 32 L. Ed. 1054;

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II.

Misjoinder of parties defendant:

Code of Civil Procedure of California, Sec. 430;

Hurt v. Hollingsworth, 100 U. *W*. 100, 25 L. Ed. 569;

Lindsay v. Shreveport Bank, 156 U. S., 485, 39 L Ed. 505;

Lantry v. Wallace, 182 U. S. 536, 45 L. Ed. 1218.

III.

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IV.

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Goebel v. Gregg, 57 Cal. App. 651, 207 Pac. 917;

Reios v. Mardis, 18 Cal. App. 276, 122 Pac. 1091;

Loeffler v. Wright, 13 Cal. App., 224; 232-233;

San Joaquin, etc., Co. v. County of Stanislaus, 155 Cal. 21, 29;

Bell v. Bank of Calif., 153 Cal., 234, 244-5;

Foss v. Peoples Etc., Co. 89 N. E. 356 (Ill. Sup.)

Respectfully submitted,

Joseph L Lewinson

L R Martineau Jr

Attorneys for Defendant John E. Sutherlin.

[Endorsed]: Received copy of the within Demurrer and Brief this 3 day of May 1929 E. D. Moore, D. A. Knapp & John H. Bradley Attorneys for Plaintiff. Filed May 3, 1929. R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

NOTICE OF MOTION TO STRIKE PLAINTIFF'S AMENDED COMPLAINT.

TO GRACE E. LOW, PLAINTIFF, and EWELL D. MOORE, ESQ., D. A. KNAPP, ESQ., and JOHN H. BRADLEY, ESQ., HER ATTORNEYS:

You and each of you will please take notice that the undersigned, attorneys for defendants, will on the 13th day of May, 1929, at 10:00 o'clock A. M., of said day or as soon thereafter as counsel can be heard at the court room of the above-entitled Court, before Honorable Paul J. McCormick, Judge thereof, move the Court to strike from the files plaintiff's first amended complaint herein, upon the ground that said first amended complaint omits and contradicts the allegations and admissions contained in plaintiff's original complaint and particularly in paragraph XVII thereof, with reference to the income from the property involved in this action and that such amendment cannot properly be made under the leave to amend heretofore granted to plaintiff.

DATED this 3rd day of May, 1929.

Joseph L Lewinson
L R Martineau Jr
Attorneys for Defendants.

[TITLE OF COURT AND CAUSE.]

MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION TO STRIKE PLAINTIFF'S AMENDED COMPLAINT.

Bank of Woodland v. Heron, 122 Cal. 107, 54 Pac. 537;

Brown v. Aguilar, 202 Cal. 143, 259 Pac. 735.

Joseph L Lewinson
L R Martineau Jr.
Attorneys for Defendants.

[Endorsed]: Received copy of the within Notice of Motion to Strike and authorities this 3 day of May 1929 E D Moore D. A. Knapp John H Bradley Attorneys for Plaintiff. Filed May 3, 1929 R. S. Zimmerman, Clerk, by Edmund L. Smith Deputy Clerk

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At a stated term, to wit: The September Term, A. D. 1929 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 14th day of October in the year of our Lord one thousand nine hundred and twenty-nine

Present:

The Honorable F. C. Jacobs, District Judge.

Grace E. Low, Plaintiff,	)	
	)	
vs.	)	No. 3324-M Civ.
	)	
Sutherlin, Barry & Co., Inc., et al., Defendants.	)	
	)	

This cause having been heretofore submitted on the hearing and briefs filed upon the Demurrer of Sutherlin,

Barry and Company, Inc., and John E. Sutherlin, the Court enters the following order:

The General Demurrer of Sutherlin, Barry & Company, Inc., is sustained.

The General Demurrer of John E. Sutherlin is sustained and this action is dismissed.

[TITLE OF COURT AND CAUSE.]

JUDGMENT OF DISMISSAL

This cause came on to be heard at this term upon the demurrers of defendants and each of them to the complaint herein, as amended, and was argued by respective counsel of the parties hereto; and thereupon, after due consideration thereof, the Honorable F. C. Jacobs, District Judge on the 14th day of October, 1929, made an order sustaining the demurrers of Sutherlin, Barry & Company, Inc., and John E. Sutherlin, without leave to amend; and

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the above entitled cause be and the same is dismissed with prejudice at the costs of the plaintiff.

F. C. Jacobs

District Judge.

Approved as to form as provided
in Rule 44
Joseph L. Lewinson
L R Martineau Jr
Attorneys for Defendants.

Ewell D Moore
D. A. Knapp
John H Bradley
Attorneys for Plaintiff.

Judgment entered and recorded Oct 15 1929

R. S. Zimmerman, Clerk

By Louis J. Somers Deputy Clerk

[Endorsed]: Filed Oct 15 1929 R. S. Zimmerman, Clerk By Louis J. Somers Deputy Clerk

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District Court of the United States
SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
(NOW CENTRAL DIVISION)

Grace E. Low, Plaintiff, vs. Sutherlin Barry & Company, Inc., and John E. Sutherlin, Defendants.	No. 3324 M Civil

I, R. S. ZIMMERMAN, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing to be a full, true, and correct copy of an original Judgment entered in the above-entitled cause and recorded in Judgment Book 5, Central Division, at page 36 thereof; and I do further certify that the papers hereto annexed constitute the Judgment Roll in said cause.

ATTEST my hand and the seal of said District Court, this 4th day of November A. D. 1929.

R. S. ZIMMERMAN,
Clerk.

By Louis J. Somers
Deputy Clerk.

(SEAL)

[TITLE OF COURT AND CAUSE.]

PETITION FOR APPEAL

To the HONORABLE, F. C. JACOBS, District Judge:

The above-named plaintiff, feeling aggrieved by the judgment of dismissal entered on the 15th day of October 1929, in the above-entitled cause, does hereby appeal from said judgment to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the Assignment of Errors filed herewith, and plaintiff prays that her appeal be allowed and that a Citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, California, under the rules of such court in such cases made and provided;

And your petitioner prays that the proper order relating to the security to be required of her be made.

Dated: December 30, 1929

Grace E. Low

Petitioner.

D. A. Knapp
Ewell D. Moore
Attorneys for Petitioner.

Appeal allowed upon giving bond as required by law for the sum of (350-) Dollars.

Wm P. James

JUDGE,

I am signing this in the place of Judge Jacobs who heard the matter and who has returned to Arizona.

[Endorsed]: Filed Jan 9 - 1930 R. S. Zimmerman, Clerk By M. L. Gaines Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

ASSIGNMENT OF ERRORS.

Comes now the plaintiff in the above-entitled action and files the following Assignment of Errors upon which she will rely upon her prosecution of the appeal in the above-entitled cause, from the judgment made by this Honorable Court on the 14th day of October 1929, and entered by the Clerk of the above-entitled court on the 15th day of October 1929, at Los Angeles, California.

I.

That the United States District Court for the Southern District of California, Central Division, erred in sustaining the demurrers of defendants, Sutherlin Barry & Company, Inc., and John E. Sutherlin, to plaintiff's first amended complaint and in the judgment of dismissal of plaintiff's action herein.

WHEREFORE, plaintiff prays that said judgment be reversed and that said District Court for the Southern District of California, Central Division, be ordered to enter a judgment reversing the decision of the lower court in said cause.

Dated December 30, 1929.

D. A. Knapp
Ewell D. Moore
Attorneys for Plaintiff.

[Endorsed]: Filed Jan 9- 1930 R. S. Zimmerman, Clerk By M. L. Gaines Deputy Clerk

[TITLE OF COURT AND CAUSE.]

STIPULATION

It is hereby stipulated and agreed by the respective parties hereto by and through their respective counsel that the following items may be omitted from the record on appeal, to-wit: Item No. 4—Motion to transfer cause to Equity Docket; Item No. 5, Plaintiff's brief on motion to transfer and counter-affidavit, and Item No. 6, Defendants' reply brief thereto; and that the clerk of the above entitled court be and he is hereby instructed to omit said items from said record.

It is further stipulated and agreed by the parties hereto that by way of amplification of the matters mentioned in the affidavit of L. R. Martineau, Jr. executed on the 21st day of March, 1929, and filed as a part of the records and files of the above entitled cause, and in order to simplify the record on appeal in this cause and to avoid the necessity of setting out in extenso the pleadings in the actions referred to in said affidavit, the following may be accepted by the court as a statement of the substance of the issues presented in said actions and of the disposition made of each of said suits (with the exception of this cause now pending on appeal—No. 3324-M):

—A—

GRACE E. LOW, Plaintiff,	)	
vs.	)	No. 2835-J
SUTHERLIN BARRY & COMPANY, INC. AND JOHN E. SUTHERLIN, Defendants.	)	

This action was originally filed on or about April 29, 1927, in the Superior Court of the State of California, in and for the County of Los Angeles, under Docket No.

222843, and was removed by the defendants to the United States District Court for the Southern District of California, Southern Division.

The original complaint alleged that plaintiff was the owner of the same two parcels of real estate which are involved in this action now pending on appeal (No. 3324-M), namely, the "Engstrum Property" in Los Angeles, California, and the "United States Island" property in Venice, California; that on June 29, 1925, plaintiff and defendants made and executed the same agreement which appears as Exhibit "C" attached to plaintiff's original complaint in this action (No. 3324-M); that the transaction represented by said agreement was placed in escrow with Citizens Trust & Savings Bank of Los Angeles, California, and that plaintiff went forward under the terms of said agreement incurring various expenses incidental thereto, but that before the loan could be closed the defendants threatened to withdraw from the transaction unless plaintiff would pay an additional sum of Fifty-nine Hundred Dollars ($5900.00); that plaintiff accordingly executed two promissory notes each in the sum of Twenty-nine Hundred Fifty Dollars ($2950.00); that defendants negotiated one of said notes and the holder brought suit for its collection and garnisheed plaintiff's tenants, annoying and harrassing them and causing them to vacate their apartments; that on April 5, 1926, at the request of the defendants, the trustee issued a declaration of default and served notice that the property would be sold under the powers contained in the trust deed on May 25, 1926; that the sale was postponed until June 1, 1926, and again until June 8, 1926, and that in the meantime, to-wit, on June 4, 1926, plaintiff and defendants entered into the same agree-

ment which appears as Exhibit "E" attached to plaintiff's complaint in this action now pending on appeal (No. 3324-M); that pursuant to the agreement of June 4, 1926, the trustee's sale was postponed to August 12, 1926, at 10 o'clock A. M.; that at or immediately prior to said time, plaintiff produced one Rodolfo Montes who expressed his ability and willingness to pay up all arrearages and defaults in said matter as soon as the banks should open on said day, but that notwithstanding said assurance, the trustee, at defendants' insistence, proceeded with the sale and sold to the defendants for the sum of $292,500.00 the property which was reasonably worth $666,725.00, thus depriving plaintiff of her property; that upon taking possession of said real property the defendants also took possession and converted to their own use the furnishings and fixtures thereof of the value of $50,000.00; and that the defendants had been operating the property since May 1, 1926, without accounting to plaintiff for the income received.

The complaint prayed for judgment that the title to the property be quieted in plaintiff, that the bond issue be declared illegal and void, that plaintiff recover damages in the sum of $500,000.00, that defendants be required to account for the income of the property and for further relief.

The complaint was amended and defendants interposed demurrers to the amended complaint which were sustained by the court with leave to amend; thereafter, plaintiff filed a second amended complaint in said action praying judgment for Five Hundred Thousand Dollars ($500,000.00) damages for the loss of the real property and Fifty Thousand Dollars ($50,000.00) for the conversion of the fur-

nishings and fixtures; that defendants be required to account and for further relief. Defendants interposed demurrers to said second amended complaint and on the day of the hearing on said demurrers said action was dismissed on plaintiff's motion, and on the same day the above entitled action now pending on appeal (No. 3324-M) was filed by plaintiff.

—B—

GRACE E. LOW, Plaintiff,	)	
vs.	)	No. M-83-J
SUTHERLIN BARRY & COMPANY, INC., ASBURY CORPORATION, CITIZENS TRUST & SAVINGS BANK, JOHN E. SUTHERLIN, ET AL., Defendants.	)	

This case was filed on or about June 10, 1927, in the Superior Court of the State of California, in and for the County of Los Angeles, under Docket No. 226032, and was removed on petition of defendants to the United States District Court for the Southern District of California, Southern Division.

The complaint alleged that plaintiff was the owner of the Engstrum property, being one of the two parcels of real estate involved in this action now pending on appeal (No. 3324-M); that the defendants, John E. Sutherlin and Sutherlin Barry & Company, formed a "scheme and design" to acquire said property without just compensation and that all of the acts of said defendants referred to in the complaint were performed in pursuance of said "scheme and design"; that on June 29, 1925, plaintiff

and the defendant, Sutherlin Barry & Company, made and executed the same agreement which appears as Exhibit "C" attached to plaintiff's original complaint in this action (No. 3324-M); that the transaction represented by said agreement was placed in escrow with the defendant, Citizens Trust & Savings Bank of Los Angeles, California, and that plaintiff went forward under the terms of said agreement incurring various expenses incidental thereto, but that before the loan could be closed, the defendants threatened to withdraw from the transaction unless plaintiff would pay an additional sum of $5900.00; that plaintiff accordingly executed two promissory notes each in the sum of $2950.00; that the defendants negotiated one of said notes and the holder brought suit for its collection and garnisheed plaintiff's tenants, annoying and harrassing them and causing them to vacate their apartments; that said $5900.00 so exacted was in reality an additional bonus and was in violation of the permit obtained from the Commissioner of Corporations of the State of California for the sale of said securities; that on April 5, 1926, at the request of the defendants, the trustee issued a declaration of default and served notice that the property would be sold under the powers contained in the trust deed on May 25, 1926; that the sale was postponed until June 1, 1926, and again until June 8, 1926, and that in the meantime, to-wit, on June 4, 1926, plaintiff and the defendant Sutherlin Barry & Company, entered into the same agreement which appears as Exhibit "E" attached to plaintiff's complaint in this action now pending on appeal (No. 3324-M); that pursuant to the agreement of June 4, 1926, the trustee's sale was postponed until August 12, 1926, at 10 o'clock A. M.; that at or immediately prior to said time plaintiff produced one Rodolfo Montes who expressed his

ability and willingness to pay up all arrearages and defaults in said matter as soon as the banks should open on said day, but that notwithstanding said assurance, the trustee, at defendants' insistence, proceeded with the sale and sold to the defendants for the sum of $292,500.00 the property which was reasonably worth $666,725.00; that upon the consummation of said sale the trustee conveyed said property by deed to the defendant, Sutherlin Barry & Company, who later conveyed the same to the defendant, Asbury Corporation; that the defendant, Asbury Corporation, acquired said property with full knowledge of all of the facts and that the trustee's sale was fraudulent and void; that said transaction was usurious and that the trust indenture and bonds were void as to the interest provisions therein contained; that the bond issue was void by reason of the exaction of interest in violation of the permit of the Corporation Commissioner and that each of the defendants claimed an interest in the property adverse to that of plaintiff.

The complaint prayed for judgment that the sale be set aside, that the interest agreement be declared illegal and void, that the trust indenture and bond issue be declared void under the Corporate Securities Act of the State of California, that the defendants be required to set forth the nature of their claims in and to the real property and that plaintiff's title be quieted as against the defendants, and each of them.

The defendants interposed a motion to dismiss said complaint for want of equity, misjoinder and uncertainty; said motion was granted on June 4, 1928, by the Hon. William P. James, Judge of said Court, without leave to amend, and said cause was dismissed with prejudice on the 3rd day of July, 1928.

—C—

GRACE E. LOW,	)	
	(	
Plaintiff,	)	
	(	
vs.	)	
	(	
SUTHERLIN BARRY & COMPANY, INC., LOS ANGELES TRUST & SAFE DEPOSIT CO., PACIFIC SOUTH-WEST TRUST & SAVINGS BANK, JOHN E. SUTHERLIN, GEORGE ACRET AND ANASTASIA ACRET, ET AL.,	) ( ) ( ) ( ) ( ) (	No. M-84-J
Defendants.	)	

This case was filed on or about June 23, 1927, in the Superior Court of the State of California, in and for the County of Los Angeles, under Docket No. 227222, and was removed on petition of defendants to the United States District Court for the Southern District of California, Southern Division.

The complaint in this case was substantially similar to the complaint last above-mentioned, the only material difference being that this case involved the "U. S. Island" property, whereas case M-83-J involved the "Engstrum" property.

The prayer of this complaint was likewise very similar to the prayer of the complaint in the case last above-mentioned, except as to the property involved.

The defendants interposed motions to dismiss similar to those interposed by them in case No. M-83-J, and the same disposition was made of this case which was likewise dismissed with prejudice by order of the Hon. William P. James on the 3rd day of July, 1928.

—D—

GRACE E. LOW,
Plaintiff,
vs. No. 2814-H
SUTHERLIN BARRY & COMPANY, INC.,
Defendant.

This case which was an action for usury was filed in the District Court of the United States in and for the Southern District of California, Southern Division, on July 26, 1927.

The complaint alleged that on June 29, 1925, plaintiff and the defendant, Sutherlin Barry & Company, made and executed the same agreement which appears as Exhibit "C" attached to plaintiff's complaint in this action (No. 3324-M); that the transaction represented by said agreement was placed in escrow with Citizens Trust & Savings Bank of Los Angeles, California, and that plaintiff went forward under the terms of said agreement incurring various expenses incidental thereto, but that before the loan could be closed, the defendants threatened to withdraw from the transaction unless plaintiff would pay an additional sum of $5900.00; that plaintiff accordingly executed two promissory notes each in the sum of $2950.00; that one of said notes had been paid in full but that the other had never been paid; that on April 5, 1926, at the request of the defendants, the trustee issued a declaration of default and served notice that the property would be sold under the powers contained in the trust deed on May 12, 1926, on which last mentioned date the trustee sold the trust property to the defendant, Sutherlin Barry & Company, for $292,500.00, which sum was applied first to costs

25, 1926; that the sale was postponed until June 1, 1926, and again until June 8, 1926, and still again until August and attorneys fees, second to payment of interest, and the balance to apply on unpaid principal; that by reason of the 10% discount in the sale price of the bonds, and by reason of the exaction of said $5900.00, and by reason of the operation of the acceleration clause in the trust deed, said transaction was usurious; that the defendant exacted a total of $55,000.00 by way of interest.

The prayer of the complaint was that said interest payment of $55,000.00 should be trebled and that plaintiff might have judgment for the sum of $165,000.00.

The complaint was twice amended; a demurrer was interposed on behalf of the defendant which was sustained by the Hon. William P. James, Judge of the above entitled Court, without leave to amend, and the case was accordingly dismissed on December 19, 1928.

From the order sustaining the demurrer and dismissing the case, plaintiff prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, which last named Court rendered its decision adverse to plaintiff on the 21st day of October 1929. (35 Fed. (2d) 443).

It is further stipulated that this stipulation shall be included in the transcript on appeal.

This stipulation is made without prejudice to the rights of plaintiff to object to the relevancy of any or all of the facts and matters herein set out.

Dated this 6th day of February, 1930.

Ewell D Moore
D A Knapp
Attorneys for Plaintiff.
Joseph L Lewinson
L R Martineau Jr
Attorneys for Defendants.

[Endorsed]: Filed Feb. 7, 1930. R. S. Zimmerman, Clerk by Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

UNDERTAKING ON APPEAL

WHEREAS, the Plaintiff in the above-entitled action is about to appeal to the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California from an order entered against her in said action, in said United States District Court, Southern District of California, Central Division, in favor of the defendants in said action, on the 15th day of October 1929, sustaining the demurrers of defendants to plaintiff's first amended complaint, and judgment of dismissal of plaintiff's action herein;

NOW, THEREFORE, in consideration of the premises and of such appeal, the undersigned, NATIONAL SURETY COMPANY, a corporation organized and existing under the laws of the State of New York, and duly authorized to transact a general surety business in the State of California, does hereby undertake and promise on the part of the Appellant that said Appellant will pay all damages and costs which may be awarded against her on the appeal, or on a dismissal thereof, not exceeding

Three Hundred and Fifty ($350.00) Dollars, to which amount it acknowledges itself bound.

IN WITNESS WHEREOF, the said surety has caused these presents to be executed and its official seal attached by its duly authorized Attorney-in-Fact, at Los Angeles California, the 23rd day of January, 1930.

NATIONAL SURETY COMPANY,
By J. PAUL KIEFER
Attorney in Fact [Seal]

Examined and recommended for approval as provided in Rule 28.

EWELL D. MOORE
Attorney.

I hereby approve the foregoing bond.
Dated the 23d day of January, 1930.
Wm P James
Judge.

STATE OF CALIFORNIA)
COUNTY Los Angeles (ss:

On this 23rd day of January, in the year 1930, before me, Frances T. Mixson, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn personally appeared J. Paul Kiefer, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the NATIONAL SURETY COMPANY, a Corporation, and acknowledged to me that he subscribed the name of the NATIONAL SURETY COMPANY thereto as Principal and his own name as Attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

FRANCES T. MIXSON
Notary Public in and for said County and State.
[Seal] My Commission Expires August 31, 1932

[Endorsed]: Filed Jan 23 1930 R. S. Zimmerman, Clerk By M. L. Gaines Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

STIPULATION FOR DIMINUTION OF RECORD ON APPEAL

For the purpose of reducing the record on appeal in the within cause, No. 3324-M filed in the District Court of the United States for the Southern District of California, Central Division, entitled Grace E. Low plaintiff, vs. Sutherlin Barry & Company, Inc. and John E. Sutherlin defendants, it is hereby stipulated by and between the counsel for the respective parties as follows:

1. That the Clerk of the above-entitled court be, and he is hereby requested to ignore the praecipes filed heretofore by counsel for the respective parties, specifying the documents to be included in the record on appeal, and, in lieu of said praecipes, that there shall be included in said record the following documents and papers:

(a) Original Complaint.

(b) Demurrers to the original complaint.

(c) Order of Court sustaining the demurrers to original complaint.

(d) Stipulation of counsel that the exhibits attached to original complaint need not be attached to first amended complaint.

(e) First amended complaint.

(f) Demurrers to first amended complaint.

(g) Motion of defendants to strike first amended complaint.

(h) Minute order of Court sustaining general demurrers and dismissing the action.

(i) Judgment of dismissal.

(j) Petition for appeal.

(k) Order allowing appeal.

(l) The citation.

(m) The bond on appeal.

(n) Original summons and return of service.

(o) The Clerk's certificate to judgment and judgment roll.

(p) Assignment of errors.

(q) Affidavit of L. R. Martineau, Jr. dated March 21, 1929.

(r) Affidavit of Ewell D. Moore contra to Mr. Martineau's affidavit of March 21, 1929.

(s) Stipulation of counsel for the parties dated February 6, 1930.

2. That all headings on the various documents, except the original complaint, included in the record on appeal, may be omitted, with the exception of the words "Title of Court and Cause," and the descriptive title of such documents.

3. That all of the type-written or printed matter on the backs of the various documents included in the said record on appeal, may be omitted, except the filing marks thereon.

4. That this stipulation shall be included in the record on appeal.

Dated April 1, 1930.

Ewell D. Moore
D. A. Knapp
Attorneys for Plaintiff.

L. R. Martineau Jr
Joseph L. Lewinson
Attorneys for Defendants.

[Endorsed]: Filed Apr. 4, 1930. R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 174 pages, numbered from 1 to 174 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; complaint; summons and return thereon; demurrers; affidavit of L. R. Martineau, Jr.; counter affidavit of Ewell D. Moore; minute order sustaining demurrer; first amended complaint; stipulation regarding exhibits; demurrers; notice of motion to strike; judgment of dismissal; clerk's certificate to judgment roll; petition for appeal; order allowing appeal; assignment of errors; stipulation; undertaking on appeal, and stipulation regarding record on appeal.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of April, in the year of Our Lord One Thousand Nine Hundred and Thirty, and of our Independence the One Hundred and Fifty-fourth.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 6173.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Grace E. Low,
Appellant,

vs.

Sutherlin, Barry & Company, Inc., and John E. Sutherlin,
Appellees.

APPELLANT'S BRIEF.

EWELL D. MOORE,
1010 Pershing Square Building,
D. A. KNAPP,
739 Subway Terminal Building,
Los Angeles, California,
Attorneys for Appellant.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

No. 6173.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Grace E. Low,

Appellant,

vs.

Sutherlin, Barry & Company, Inc., and John E. Sutherlin,

Appellees.

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

Appellant brought her action against appellees for damages. Appellee's demurrers to the original complaint were sustained with leave to amend. Demurrers were taken to the amended complaint and judgment of dismissal with prejudice was entered on the 14th day of October 1929. The appeal is taken from said judgment.

Briefly, the complaint as amended sets out:

That in June 1925, appellant owned valuable and productive real property in Los Angeles county, including a large apartment house on West Fifth Street, Los Angeles, almost adjacent to the Biltmore Hotel, Los Angeles,

known as the "Engstrum Property", and certain land and bungalows at the beach city of Venice.

That prior to June 1925, appellant found herself in a situation that required the borrowing of a large sum of money to refinance obligations on said properties. That at the moment appellees, through John E. Sutherlin, president of Sutherlin, Barry & Company, Inc., proposed loaning to appellant $360,000, but in so doing contemplated and initiated a scheme and device to procure unto themselves the properties of appellant through a plan, suggested by appellees to appellant, of issuing and selling her bonds, secured by all of her said property, the said bonds to be sold only to appellees, and at 90¢ on the dollar;

That the said plan of appellees was carried out in all its legal details, each and every document being prepared by appellees and executed by the parties with no acts on appellant's part other than the mere formality of signing the papers presented to her by the appellees; the part of the appellant in the transaction being well expressed in the words of the complaint, as amended, to-wit: that she was without financial or business experience, had no knowledge of bond issues or similar financial transactions, was laboring under great mental stress and worry by reason of the physical collapse of her husband, and harassed by the demands made upon her to meet the obligations then pressing upon the said properties.

That in carrying out said scheme, appellees saw to it that all of the charges, expenses, fees and costs were borne and paid by the appellant alone; that representations were made by the appellees to appellant that their

investigation and their wide and varied experience convinced them that the property would realize sufficient income to pay all interest, costs, and charges of whatsoever kind in connection with the bond issue, and leave a sufficient sum over and above such requirements to enable her to refurnish the said Engstrum property; that appellant accepted the said statements as true, and entered into the transaction with full reliance upon said representations.

That appellees carried through the scheme which ultimately resulted in the foreclosure of the trust indenture given by appellant as security for the bonds, and that by reason thereof appellant lost, not only the said Engstrum property, but in addition thereto all of the furniture and fixtures therein, notwithstanding the fact that said furniture and fixtures were not included in said trust indenture.

That the methods by which appellees induced appellant to enter into the financing plans, as well as the methods followed by the appellees subsequent thereto, were fraudulent, and that by reason thereof appellant, was damaged in a large sum.

I.

The Court Erred in Sustaining the General Demurrers and Dismissing the Case.

Shea v. Nilima, 133 Fed. 209.

> "Where a complaint states the substantial facts which constitute a cause of action, or they can be inferred by reasonable intendment from the matters set forth, it will be held sufficient, in the absence of a motion to make it more definite and certain, not-

withstanding imperfections of form or the omission of specific allegations."

White v. Lyons, 42 Cal. 279.

"If the complaint states facts which entitles the plaintiff to relief, either legal or equitable, it is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action."

James v. Schafer, 70 Cal. App. 372, at p. 380.

Although private transactions are presumed to be fair, and free from fraud, the rule is governed by certain exceptions.

Confidential Relationship.

Cox v. Schnerr, 172 Cal. at p. 378.

"And this rule does not apply merely to those who bear a formal relation of trust . . . It applies in every case where there has been a confidence reposed which invests the person trusted with an advantage in treating with the person so confiding. (2 *Jones on Evidence*, ed. of 1913, sec. 190.)"

"In every transaction of this kind, one who holds such confidential relation will be presumed to have taken undue advantage of the trusting friend, unless it should appear that such person had independent advice and acted not only of his own volition, but with full comprehension of the results of his action."

In the case cited, *supra*, is one where the grantee of a deed held a judgment status over a woman of weak mentality and secured the execution of the deed to himself.

Ross v. Conway, 92 Cal., p. 632,

is a case restating the rule where the defendant was a pastor of a church, whereas the grantor was of weak mind and approaching death.

Odell v. Moss, 130 Cal., p. 352,

restates the rule where the deal was between brother and sister, and the court declares there was no technical confidential relationship, but that the relationship was "superinduced" "*as a matter of fact*".

Allegations Sufficient to Show Fraud by Reason of Confidential Relationship.

In the instant case, appellee John E. Sutherlin was the president and major owner of appellee Sutherlin, Barry & Company, Inc., a company specializing in financing hotels and apartment houses, under bond issues, according to his own statements, and had "wide and varied experience behind him." [Tr. p. 120.] He sought out the appellant. [Tr. p. 119.]

Appellant was not only without business experience but was so harassed about her business and worried over the physical collapse of her husband and the difficulties into which she had been suddenly thrust, that she was not possessed of the mental stability to grasp or comprehend the figures set up and statements made by said appellee, which facts she recited to said appellee John E. Sutherlin, and all of which he knew. [Tr. pp. 120, 121.] In other words she was at the time in a condition best described as "mental confusion".

If one person approaches another and asks him to enter into a business deal and the answer is, "all right, but I am under great mental stress and will simply have to rely on you," and if the proposer goes ahead and the promisor has no independent advice. has not the proposer assumed a confidential relationship in law as well as in fact?

If the law looks merely to the reason for confidential relationship, the element of long association and dependency becomes a necessary factor; but if it is merely a question of fact, then, we submit, time or prior dependency has nothing to do with it. The instant case is one of confidential relationship, wherein appellees not only proposed to secure the writings appearing, but assumed the character and status of confidential advisors, "to the end that they would utilize their wide and varied financial experience and prepare for her a careful and conservative 'set-up' upon which in all future negotiations, plaintiff might safely act." etc. [Tr. p. 120.]

The pleadings might have stated that the appellees approached appellant while she was mentally ill, knowingly so, and persuaded her to accept their proposition, with the facts and figures, as confidential advisors; that they set forth figures which appellees knew that appellant did not understand, and that appellant executed their papers solely in reliance on the false representations of appellees as to the matters concerned; but it would not then have stated the facts one whit more to the point.

The conclusion is inevitable, that the appellees did assume toward appellant a confidential relationship upon which she had a right to rely.

II.

The Allegations Were Not Mere Statements of Opinion, But Constituted Fraudulent Representations.

The gravemen of the complaint so far as representations are concerned, was in the statements of appellees that they knew all the charges, expenses, costs and out-

lay required in the transaction and that *"the money derived from the sale of said bonds would be sufficient for all the requirements of said transaction and provide a large sum additional which sum appellant would be required to use for the renovating and refurnishing of said Engstrum property in order that it might earn the income estimated by appellees in said set-up"* [Tr. p. 121], and "that appellees well knew that there would not be any sum remaining after paying the charges and expenses, as aforesaid." [Tr. p. 123.]

Stated as *facts*, these allegations were not opinions. This is particularly true because of the basic fact that appellees held themselves out to be, and presumably were, *financial experts as to bond issues*. Not only that, but the question of the amount of the charges, expenses, etc., *were absolutely material* to the transaction, and appellant relied upon them as facts.

> *Barron Estate Co. v. Woodruff Co.*, 163 Cal. 561, at p. 573;

illustrates the point:

> "Thus the opinion of an expert employed to report upon a mine would be but the expression of his judgment and if honestly, though mistakenly, made of course no injury cognizable in law, equity or good morals could result. But instantly that the expert expresses a dishonest opinion, though it still be but an opinion, he has made himself liable in an action for deceit."

Also, on page 574, *supra*:

> "For, while it is true, as is argued on behalf of respondents, that because of the fact that the plans and specifications had not been settled upon and agreed to, it was an impossibility for any human

> being to state . . . what the exact cost of the building would be, and that therefore the language at most could be but an expression of defendants' opinion, the answer is that in this day of architectural skill and business knowledge of construction in connection therewith, any competent architect . . . can name as matter of fact a figure beyond which the cost will not go. Such a statement is a *statement of fact* . . ."

The contingencies and elasticity of the costs of building are infinitely greater than the mere set and established costs and charges incident to a bond issue, all of which would be within the absolute knowledge of an expert on such matters. The statement was not an opinion; it was a material fact statement. This court is referred further to

Herdan v. Hanson, 182 Cal. 538;
Crandall v. Parks, 152 Cal. 772, at p. 776;
Groppengiesser v. Lake, 103 Cal. 37.

III.

The Vital Fraudulent Representation Alleged Was Not Inconsistent With Exhibits Attached to the Complaint.

The theory of appellee's argument upon the demurrers as to the foregoing is that, no matter what the "set-up" might have shown, or failed to show, in the way of alleged false representations the agreements executed by appellant are in absolute denial.

Exhibit "A" [Tr. p. 27, subdiv. d.] provides that "the owners' shall maintain fire and earthquake insurance and boiler insurance and rental insurance. The same exhibit shows [Tr. p. 29, paragraph sixth] that, inferentially,

appellant was to be liable for a state corporation permit to issue said bonds, etc. It also showed that any special assessments must be met by appellant. In paragraph ninth [Tr. p. 30] further charge items were set forth in detail, but there was not one word as *to the amount of any charge.*

The theory of appellant's complaint is that appellees knew every charge, the precise amount of every charge; and set them down in black and white *falsely* and fixed a total sum that was false; that they represented falsely the return of sale, the same being in a set-up which appellants made and retained lest appellant discover the deception. In only one possible particular does this exhibit offer any inconsistency with the charges of the complaint and that is in the matter of the $36,000 to be retained as sales discount. Appellant alleges she had no knowledge of this and was lead to believe she would receive the entire $36,000 as if it were in truth a loan.

Yet here is a written statement that the bonds are to be sold at 90; and in another exhibit that the net price to appellees was to be 90¢, and so on.

If these parties were on an equal footing, and if there was an understanding by appellees that these writings were executed after appellant had digested and understood them, then the citations as to inconsistency might prevail; but the pleadings set forth that not only were they not on an equal footing, but that appellees knew that appellant did not understand the writings, or their effect or import when she executed them. The pleadings set out that the said applications for a permit and

the entire proceedings were carried on solely by appellees [Tr. p. 129], and that it was all without the knowledge of appellant, either as to the details or practical import thereof, and appellees at all times well knew that "appellant had no comprehension or understanding of the ultimate effect of said permit". [Tr. p. 129.] The complaint might have also added "nor agreements as set forth in Exhibits "A" and "B"; the omission however, was not fatal, if for no other reason, than the question involved is not vital, and the point is not germane to the fraud, and bears only on the bonus of $36,000 to appellees who solicited a *loan;* who unfolded a *lending plan,* secured a permit; who carried on the negotiations without the presence of appellant, and then *"bought"* and retained, the bonds not from a *corporation* but from an *individual,* and who were the actors in moving to foreclose appellant. Appellant merely signed on the dotted line, blindly trusting appellees in every step taken to carry out a transaction of the precise nature set out to be consummated by them from the outset, knowing that appellant did not have knowledge of such matters, and at no time understood and grasped the idea of a bond *purchase price.*

It was not necessary to say that appellant did not *read* the writings involved. The ultimate fact is not in her reading or not reading them, but in the fact that appellees *knew* she did not grasp, understand or realize that she was attaching her name to writings under which she was to permit appellees to have $36,000 of the money she borrowed.

IV.

Any Inconsistency Was Excusable Under the Circumstances by Reason of Appellee's Assurances of Identity of Content.

In

Mazuran v. Stefanich, 272 Pacific Rep., p. 733 (Cal. App. Civ. No. 6564),

we have the language covering a case where the complaint alleged that defendants did not read a contract executed by them because they relied on the false statement of plaintiff that it contained precisely the services previously promised and agreed upon orally, to-wit:

> "We are inclined to the view, announced in this quotation that, upon a clear showing that a written instrument was executed by one party to it without reading it, in the belief, induced by the fraudulent representations of the other that its provisions were different from those set out, the courts should set the agreement aside."

In

Wenzel v. Shulz, 78 Cal. at p. 223,

occurs the following:

> "That the plaintiff insisted upon the immediate execution of the note, and repeatedly declared to the defendants that it was just the same as the other note, etc."
>
> "Appellant whistles these facts down the wind, saying that 'it does not appear therefrom that any relation of especial trust or confidence existed between the parties, or that defendants did not have full and equal opportunity with plaintiff to acquire knowledge of the contents of the note,' etc. But the court finds, upon ample evidence, that the plaintiff intended to deceive defendants, and that they

> were in fact deceived by his statements as to the contents of the note."

In the instant case, the demurrers *ipso facto,* admit the facts pleaded by appellant;

Togni v. Tamimelli, 11 Cal. App. at p. 14,

discussing a similar case, says:

> "Nothing is more common than for a party who has agreed to give a deed or other contract relating to some specific subject, to sign it upon being told that it is the deed or contract which had been orally agreed to. The party who so signs has not exercised the greatest degree of care, but that will not excuse a party who intentionally misleads him. No one has a right, either in law or in morals, to complain because another has placed too great a reliance upon the truth of what he himself has stated."

But even the cited case did not show that the appellees knew that appellant was at the moment in such a condition of mental confusion that the contents of the contract was impossible of appellant's comprehension and that the only thing appellant really understood was that the agreement was to the effect that all her debts were to be cleared, with sufficient moneys over and above all costs of the transaction to completely rehabilitate her apartment house so that she could realize the income necessary to meet the demands under the trust indenture.

Knight v. Bentel, 39 Cal. App. 502,

is also referred to in support of the same rule.

V.

Fraud Is Alleged With Great Particularity Where the Representations Are Shown, Their Falseness Is Alleged, and Their Materiality Is Apparent Upon the Face of the Complaint.

Civil Code of California, Sec. 1571.

"Fraud is either actual or constructive."

Civil Code of California, Sec. 1572.

"Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

2. . . .

3. The suppression of that which is true, by one having knowledge or belief of the fact;

4. A promise made without any intention of performing it; or,

5. Any other act fitted to deceive."

It is not necessary to allege the acts in entirety but if the charges are sufficiently specific to show a tort against plaintiff in the premises it constitutes good pleading.

In the last analysis appellant alleges that she was in a condition of mind equivalent to mental confusion and lack of understanding; that appellees, knowing this, with intent to deprive her of her valuable equities in her properties without consideration, led appellant to impose complete faith and trust in their honesty and ability, and then showed her a mass of figures which appellees declared amounted to the ultimate fact that she could bond her

properties to them for $360,000; that after paying all of her obligations, costs and expenses of every kind there would be enough left to completely rehabilitate and refurnish her Engstrum apartments, permitting an income of some $60,000 a year, sufficient to pay off the bond principal and interest upon that she relied and signed every paper presented by appellees without comprehending the language or purport thereof.

VI.

The Fraud Alleged Rests Entirely on the Question Whether the Appellees, Knowing That Appellant Would Not Discover the Falsity of Their Representations, and of Her Reliance Thereon, Carried Out a Transaction to Appellant's Damage.

It has been said that:

> "Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of an agreement; and he is under no obligation to investigate and verify statements to the truth of which the other party with full means of knowledge, has deliberately pledged his faith."

Dow v. Swain, 125 Cal. 674;
Teague v. Hall, 171 Cal. 668;
Providence Jewelry Co. v. Nagel, 157 Cal. 497;
Davis v. Butler, 154 Cal. 623;
Knight v. Bentel, 39 Cal. App. 502;

(That the car was new and that contract was similar to previous contract.)

Carr v. Sacramento C. P. Co., 35 Cal. App. 439;
Morris v. Fiat Motor Sales Co., 32 Cal. App. 315;
Togni v. Taminelli, 11 Cal. App. 7 (*supra*);

(Deed supposed to be released.)

Neher v. Hansen, 12 Cal. App. 70;

Vance v. Supreme Lodge of F. B., 15 Cal. App. 178;

Gratz v. Schuler, 25 Cal. App. 117;

Gleason v. Proud, 31 Cal. App. 123.

It has also been said:

"Where one is justified in relying, and in fact does rely, on false representations, his right of action is not destroyed because means of knowledge is open to him. In such a case no duty rests upon him to employ such means of knowledge."

12 *Cal. Jur.*, 759;

Teague v. Hall, 171 Cal. 668 (*supra*);

Tarke v. Bingham, 123 Cal. 163;

Ruhl v. Mott, 120 Cal. 668.

And the law will not permit the culprit to say:

"You ought not to believe me" or "you yourself are guilty of negligence."

Tidewater So. Ry. v. Harney, 32 Cal. App. 253;

Eichelberger v. Mills Land Co., 9 Cal. App. 628.

VII.

Appellant Did Not by Any Act Affirm the Contract or Waive the Fraud.

It may be argued, and probably will be, that because appellant signed the second contract some two months after she signed the contract Exhibit "A", and had exhausted her resources in meeting the expenses required, she waived any charge of fraud; that therefore she could not object to the demand of appellees that she pay $5,-

900.00 additional for the alleged benefit of a third party, under threat that unless their demands were met they would withdraw, leaving appellant in a worse position, from which it would be too late to extract herself and save her property.

Had appellant's consent to pay the $5,900.00 thus demanded, been freely given, it might be said fraud was waived, but an apparent consent is not real or free when obtained through menace, duress or undue influence.

Civil Code of California, Sec. 1567.

"An apparent consent is not real or free when obtained through:

1. Duress;
2. Menace;
3. Fraud;
4. Undue influence; or,
5. Mistake."

Civil Code of California, Sec. 1575, subdiv. 3.

"Undue influence consists:

3. In taking a grossly oppressive and unfair advantage of another's necessities or distress."

On September 23, 1925, the complaint alleges, at a time when appellant was reduced to financial helplessness, appellees demanded that she then and there execute two promissory notes payable in 90 and 120 days respectively. There was no money in the trustee's hand. Exhibit "B" provided that the trustee was to "deduct the said $5,900" from the proceeds of the bond issue, from the excess she had been led to believe would be forthcoming, enough if it was available not only to pay for the rehabilitation of her apartment house, but to pay this sum as well, and that the payment of the $5,900 was to be delayed, in which event the financial safety of the property would not be jeopardized. [Tr. p. 126.]

VIII.

The Allegations in the Amended Complaint Were Sufficient to Show That Appellees, in furtherance of Their Scheme to Defraud Appellant, Brought About the Foreclosure by Which Appellant Lost Her Property.

It may properly again be noted that the amended complaint showed that the appellees found the appellant in great financial distress, inexperienced in business matters and in a state of mental confusion owing to the fatal illness of her husband at the time; that she was ignorant of bond issues, harassed by creditors, and that in this condition appellees represented that because of their long experience in financial matters and their readiness and willingness to carry out their proposed lending plan, appellant would be thereby relieved of all her debts, be able to meet all costs, charges and expenses involved in said plan, and provide herself with funds to refurnish her said property and put it in a condition to provide income to meet all interest, amortization and other payments; that appellees had the means, experience and knowledge to know and set out, if they had seen fit, precisely what would be the returns from said financing plan.

Induced by said representations, appellant signed all papers submitted to her by appellees, frankly confessing to them her ignorance thereof, and making no question, except to ask about the insurance; that she was told by appellees in response that her existing insurance would be sufficient, except for a merely nominal amount which would be taken care of out of the excess returns from

the loan [Tr. p. 127]; that so false and fraudulent were the said representations of appellees that when the returns were made upon said loan appellant had only $50.00 remaining, not even funds to pay the insurance premium [Tr. p. 132] which said insurance, instead of being nominal, amounted to $3,275.95; that this deficit, together with the acts of appellees, caused appellant's tenants to be harassed by garnishments in an action to collect one of the $2,950 notes [Tr. p. 131], resulting in her income being depleted, together with the entire failure of funds to rehabilitate the property, and in March 1926, less than one year from the initial contract, led to the initiation by the appellees of the foreclosure proceedings and the sale of appellant's property which was bought in by the appellees at approximately less than one-half its value.

We will not go fully into the final act of appellees whereby they secured plaintiff's signature to a writing to turn over to them her Engstrum property management and she went out to secure a third party who would pay the money they demanded, upon their promise that if she did the best she could do they would postpone the sale until October 5, 1926. The spirit of the contract was that if she did the acts mentioned and secured a third person they would restore her rights. Whatever may have been the tricks of the language they employed, or the subterfuge of the appellees as to termination of the time element, the spirit, if not the actual requirements of that contract were met on August 12, 1926, the date of the sale, when Rodolfo Montes stood ready, willing and able to meet all the demands of appellees in the premises; but appellees would not wait the few minutes

required, and sold the property to themselves at less than half its value, and took over, besides, more than $30,000 of plaintiff's personal property not pledged under the trust indenture.

Appellant prays that the order appealed from be reversed, and that if her amended complaint be in any way deficient, she be allowed to properly amend it.

Respectfully submitted,

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No. 6173

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Grace E. Low,
Appellant,

vs.

Sutherlin, Barry & Company, Inc., a corporation, and John E. Sutherlin,
Appellees.

BRIEF OF APPELLEES.

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TOPICAL INDEX

TABLE OF CASES AND AUTHORITIES CITED.

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BRIEF OF APPELLEES.

Statement of the Case.

Appellant's brief does not contain an adequate statement of the case, and is misleading by reason of erroneous assertions and the omission of material matters.

The demurrer was sustained without leave to amend, not only because the amended complaint failed to state a cause of action, but also because in four other actions previously brought by appellant against appellees in the court below, on the transaction here in suit, appellant had been unable to state a case in any of her respective pleadings. [Tr. 113-116; 162-170.]

The case undertaken to be argued in appellant's brief is largely hypothetical, and not based on the record.

It is claimed in the brief that appellant, although the owner in possession of valuable apartment house properties and faced with the necessity of re-funding obligations in excess of $300,000, was so weakminded and in such a state of mental confusion that she did not know the income of her properties and could not grasp the idea of selling bonds at ninety, or understand the terms of mortgages relating to interest maturities, or the obligation to keep property insured. (Ap. Br., p. 15.) While appellant was in this condition, according to the brief, corporate appellee, an investment banker, and individual appellee, its president, gained appellant's confidence and suggested she make an application to corporate appellee for refinancing. To this suggestion, it is said in the brief, appellant, in effect, replied, "All right, but I am under great mental stress and will simply have to rely on you." (*Id.* p. 7.) Whereupon appellees "assumed the character and status of confidential advisors 'to the end that they would utilize their wide and varied financial experience and prepare for her a careful and conservative 'set-up' on which in all future negotiations plaintiff might safely act.'" (*Id.* p. 8.) Under these circumstances, the brief charges, appellees prepared and submitted to appellant a set-up as the basis for a bond issue secured by a mortgage, which set-up represented appellant's income as larger than it was, and represented the interest, insurance and other requirements of the bond issue as less than appellant's income. The brief further charges: In making these representations, appellees acted dishonestly and with the design and purpose of inducing

appellant to mortgage her properties to corporate appellee on such conditions that corporate appellee would be able to foreclose and acquire the properties for less than their true value (*Id.* p. 20); appellees accordingly foisted on appellant a loan agreement and bond issue secured by a mortgage, in terms different than the set-up, on the false representation that the terms were the same. Although appellant read the instruments, she "did not grasp, understand or realize" what she was doing, and "merely signed on the dotted line, blindly trusting appellees." (*Id.* p. 12.) As a result of this fraud and circumvention, appellant issued mortgage bonds, and defaulted in the payment of interest and breached her covenant to keep the property insured; and appellees caused the property to be foreclosed, and purchased the same at the foreclosure sale for half its true value. (*Id.* p. 21.)

The case thus presented in appellant's brief is not at all justified by the record.

It appears from the amended complaint: (a) appellees practiced no fraud on appellant and on the contrary extended many indulgences to her; (b) appellant was in her right mind and read and understood the documents; (c) appellant knew the income of her property and defaulted because she misapplied the income to her personal uses; (d) appellees did not stand in a confidential relationship toward appellant; (e) appellant makes no allegations of fact relative to the supposed set-up upon which she attempts to base her case.

In September, 1925, pursuant to a contract made with appellant in June of that year, corporate appellee purchased from appellant mortgage bonds of the face value

of $360,000 at ninety, or for a cash consideration of $324,000. [Am. Comp. Tr. 129-130.] Maturities were arranged so that no principal fell due for the first two years. The bonds were dated August 1, 1925, and the first semi-annual interest fell due on February 1, 1926. This was not paid. Meanwhile, appellant had failed to keep the properties insured, and on December 23, 1925, she had been notified of her default in that regard. (*Id.* 132.) On March 1, 1926, appellant was served with notice of default. (*Id.* 133.) Notice of sale was also given and the date fixed as May 25, 1926, although the indenture required only thirty days' notice. (*Id.* 137.) At appellant's request, the date of sale was postponed to June 1, 1926, then to June 8, 1926, then to August 1, 1926, then to August 12, 1926. [Am. Comp. Tr. 137 and Exhibit "E", Tr. 102.] Appellant still being in default on the date last mentioned, the sale was had, and the property sold to the corporate appellee, who was the only bidder. [Am. Comp. Tr. 135.] Appellant was not prevented from bidding or presenting bidders at the sale, but she neither bid nor presented a bidder. All appellant did in connection with the sale was to have a Mexican gentleman present, not with any cash, however, but merely with a promise to pay the amounts in default sometime in the future if the sale were again postponed. Appellant has never undertaken to redeem the property and she did not bring this suit until more than two years after the sale, namely on November 21, 1928. [Tr. p. 108.]

From the amended complaint it appears that appellant was not distracted to the point of lunacy when she contracted to make the loan, as claimed in her brief. On the

contrary she was in full possession of her faculties, and knew what she was about at that time and all other times here in question. Thus, it is alleged that prior to the execution of the loan agreement "plaintiff called the attention of defendants, and particularly of defendant John E. Sutherlin, to the provisions therein contained as to the insurance required to be placed and paid for by plaintiff upon her said Engstrum and Venice properties, and stated to said defendants that the insurance requirements therein set forth appeared to be in excess of the amount provided for in the said 'set-up' as prepared by defendants and exhibited to plaintiff as aforesaid." [Tr., pp. 126-127.] This allegation of the amended complaint would appear to refute the fanciful assertions in appellant's brief relative to her mental condition and failure to comprehend the papers she signed. It is likewise inconsistent with, and controls, the much more restrained and only allegation in the amended complaint on the subject, namely:

> "That plaintiff was without any business experience and particularly without experience as to such matters as bond issues and so stated to defendants, which fact defendants then and there well knew. That plaintiff was then and there and theretofore and at all times herein mentioned so greatly troubled by the physical collapse of her husband that she was not then possessed of even her normal ability to grasp, understand and appreciate the figures and statements presented to her by defendants, and so explained to defendants, and that defendants conducted all of said negotiations knowing the truthfulness of plaintiff's representations of her harassment and worry as aforesaid." [Tr., pp. 120-121.]

It is admitted in appellant's brief that there is no allegation that she did not read the documents. It is said: "It

was not necessary to say that appellant did not *read* the writings involved." (Ap. Br., p. 12.) Furthermore, the loan agreement [Ex. "A", Tr. 23], the modification thereof [Ex. "C", Tr. 32], the extension agreement [Ex. "E", Tr. 102], and the other documents involved were written in straight-forward plain, easily understood English and they each and all bore appellant's signature.

There is no allegation in the amended complaint that appellant did not know the income of her properties, and no facts are alleged from which it could be inferred that the income was insufficient to meet the mortgage requirements, or that appellant defaulted for any reason other than that she applied the income of her properties to her own purposes instead of using it to meet interest and insurance payments under the bond issue. In this connection it is worthy of note that in the original complaint it was alleged under oath that the income was over $50,000 a year. This allegation is omitted from the amended complaint; but it appears from Exhibit "C" thereto, the loan agreement [Tr., p. 38], that appellant represented in plain and simple English and arithmetic that the net income from her properties, over a period of many months, amounted to $5725 per month, which would make a total of $68,700 per annum. Interest on $360,000 at 7% for one year is $25,200. If the insurance item of $3300, and the further item of $5900 due to her original brokers (which items appellant claims not to have anticipated) be added to the interest item, the total of appellant's obligation would be brought up to $34,400, or $15,600 less than the income figure alleged in the original complaint, or $34,300 less than the income figure based on Exhibit "C."

There is no basis whatever for the claim made in appellant's brief that appellees stood in a confidential relationship toward appellant.

Referring again to appellant's brief, it is said:

> "The instant case is one of confidential relationship wherein appellees not only proposed to secure the writings proper, but assumed the character and status of confidential advisors, 'to the end that they would utilize their wide and varied financial experience and prepare for her a careful and conservative "set-up" upon which in all future negotiations, plaintiff might safely act'." (Ap. Br., p. 8.)

The quotation from the transcript in the above passage is lifted out of its context. The quotation is from paragraph IV of the amended complaint. In that paragraph it is alleged that prior to entering into the loan contract which preceded the issuance of the mortgage bonds, defendants "with the intent and purpose of developing and perfecting a scheme whereby plaintiff would be wrongfully deprived of her property", proposed to plaintiff a plan for the funding of her several obligations, said plan involving the issuance of seven per cent bonds "payable as to both principal and interest in such amounts and at such periods of time, over a term of years, as plaintiff could safely undertake in full view of the actual and probable income of her said Engstrum property as determined by defendants." [Tr. p. 120.] Immediately following the words just quoted is the quotation contained in the passage in appellant's brief which, with the language immediately following it, is as follows:

> "And to that end defendants proposed to plaintiff that they and each of them would utilize their wide and varied financial experience and would prepare

> for her a careful and conservative 'set-up', upon which in all future negotiations plaintiff might safely act, as to the extent of the bond issue necessary to pay all her obligations inclusive of the interest and the amortization payments on said bonds, together with all payments, charges and expenses necessary to the transaction, and at the same time defendants estimated the income which their experience and judgment and their investigation demonstrated she could and should obtain from her said Engstrum property, and represented to plaintiff that such income was reasonable and probable." [Tr. p. 120.]

It appears, therefore, that there is no allegation that appellees *assumed* a confidential relationship toward appellant; and no facts are alleged from which such a relationship could be inferred. Indeed the only inference from the allegations is that appellees were dealing at arm's length with appellant and were undertaking to deceive her.

There is no allegation of fact in the amended complaint relative to the alleged "set-up" from which the contents thereof could be gathered or inferred. It is alleged "that the set-up consisted of a series of figures and pencil memoranda on scratch paper", and "plaintiff at no time had possession of said set-up memoranda and no copy thereof was ever delivered to her, but that said set-up was designedly always retained by defendants." The amended complaint then proceeds:

> "And plaintiff alleges that by reason of the facts last above alleged as to said set-up she is unable to be more definite and certain in regard thereto except that she alleges that the income of the said Engstrum property as computed and stated by defendants in said set-up was greatly in excess of the income theretofore derived therefrom, and that the outlay required by defendants in order that plaintiff might safely

> enter into the said contemplated bond issue, as plaintiff thereafter ascertained, was greatly in excess of the amount represented in said set-up." [Tr. p. 122.]

It will be observed that the set-up, in so far as it related to income, related to matters peculiarly within the knowledge of appellant. It does not appear that the set-up contained a list of appellant's obligations, nor is there any statement that appellees knew the extent of appellant's obligations, and therefore knew how far the proceeds of the bond issue would go. The outlays referred to were matters of mathematical computation and the words "greatly in excess", used both as to income and outlay in the above quotation are without legal significance. All of these matters are left to conjecture. All that is supplied is the unsupported conclusion of the pleador that the set-up represented the income from the property to be in excess of appellant's obligations.

The amended complaint consists of twenty-three printed pages of narrative [Tr. pp. 117-140] and exhibits consisting of eight-three pages. [Tr. pp. 23-106.]

The theory of the amended complaint is that prior to June 29, 1925, defendants "with the intent and purpose of developing and perfecting a scheme whereby plaintiff would be wrongfully deprived of her said property and the whole thereof by defendants without any consideration whatsoever, did begin and thereafter continue a series of steps." [Par. IV, Tr. p. 119.] The various transactions between appellant and appellees are then set forth as eight steps or overt acts done in pursuance of the plan and scheme, as above stated.

Stripped of verbiage, the alleged scheme and overt acts may be stated as follows:

1. That appellees proposed to fund appellant's debts by a bond issue;

2. That appellees furnished a "set-up" showing how this could be done;

3. That the "set-up" misrepresented the "actual and probable income" of appellant's properties and the amount of her outlay;

4. That appellant relied on the misrepresentations of income and outlay and signed a proposal for underwriting the bonds;

5. That after signing the proposal and before she executed the trust indenture, she discovered the fraud when appellees required her to pay a debt of $5900 due other brokers;

6. That when appellees threatened to withdraw unless she agreed to pay the debt she was forced to agree to pay it;

7. That each act of appellees, above stated, and each act of appellees thereafter was done in pursuance of the scheme and design until the bonds were finally foreclosed.

The only misrepresentations undertaken to be alleged are:

First: That the preliminary set-up represented that the actual and probable income of appellant's properties would be sufficient to meet the bond requirements;

Second: That this set-up did not contain all the required outlay.

A review of the transactions, disclosed by the narrative portion of the pleading and exhibits, will show that they are not, nor is any of them tainted with fraud.

Prior to June 29, 1925, appellant was the owner of two parcels of real estate, one consisting of an apartment house in Los Angeles, known as the "Engstrum Property", and the other of a bungalow court in Venice, known as the "Venice Property". [Am. Comp. Tr. 117-119.] On April 22, 1925, appellant entered into a written agreement with the corporate appellee to borrow $295,000 and to evidence the loan by a bond issue on the security of one of the parcels, the Engstrum property. [Exhibit "A", Tr. 23; Am. Comp., Tr. 123-4.] On June 29, 1925, appellant and the corporate appellee abrogated the agreement of April 22nd and entered into a new contract by which the amount of the loan was increased to $360,000 and was to be secured by both the Engstrum and Venice properties. [Exhibit "C", Tr. 32.] As a part of the new transaction, appellant agreed in writing to pay a commission of $5900 due to the brokers who had been instrumental in obtaining for appellant the original loan agreement of April 22, 1925. [Exhibit "B", Tr. 31.] Bonds aggregating $360,000, secured by a deed of trust on the two properties, were executed as of August 1, 1925, pursuant to a permit issued by the Corporation Commissioner of California. [Exhibit "D", Tr. 39.] On September 23, 1925, the transaction was cleared through an escrow at the Citizens Trust & Savings Bank of Los Angeles; that is to say, the bonds were delivered to the corporate appellee, the trust indenture was delivered to the trustee for bondholders; and the proceeds of the loan were rendered to appellant. The proceeds of the bond issue being insufficient to pay off all the prior encumbrances upon the two properties and yield in addition the $5900 which appellant had agreed to pay

the brokers, appellant, concurrently with the closing of the escrow, executed and delivered two promissory notes in the sum of $2950 each, payable in 90 and 120 days, respectively. [Am. Comp., Tr. 129-130.]

The trust indenture, as well as the loan agreement, required appellant to keep the properties insured and to pay all insurance premiums. The first default of appellant was appellant's failure to do so, and on December 23, 1925, the corporate appellee notified appellant that she was in default in the payment of insurance premiums which by the terms of the trust indenture she had agreed to pay. [Am. Comp., Tr. 132.] These premiums were never paid.

The first semi-annual bond interest fell due on February 1, 1926. This interest appellant also failed to pay, and on March 1, 1926, the trustee bank served written notice of default calling attention to this breach and also declaring that on account of appellant's defaults the trustee would proceed as in the trust indenture directed. [Am. Comp., Tr. 133.] The trustee then advertised and posted notices of sale to be held on May 25, 1926. [Am. Comp., Tr. 137.] On the last mentioned date, at appellant's request, the trustee postponed the sale to June 1, 1926, and on June 1, 1926, the trustee again postponed the sale at appellant's request to June 8, 1926. [Am. Comp., Tr. 137]; [Exhibit "E", Tr. 102.]

On June 4, 1926, appellant and the corporate appellee entered into a written agreement whereby appellee agreed to use its best efforts to secure a postponement of the sale again until August 1, 1926. [Exhibit "E", Tr. 102.] In

that agreement appellee acknowledged her defaults in the following language:

> "Since the execution of said trust indenture the income from the property covered thereby has decreased and for various reasons I have been unable to meet the accruing interest and sinking fund and other charges upon said bonds and under said trust indenture." [Tr. 102.] * * * "I realize that the defaults under the above mentioned trust indenture have been long continuing and I recognize the right of the Trustee thereunder to cause the sale of the properties covered thereby to be made on June 8th, 1926, and also your right to require such sale to be made at that time." [Tr. 103.]

In addition to this recitation by appellant of her defaults, appellant, in consideration of appellees' promise, agreed in this instrument (a) to appoint and keep in office as long as she might be in default, as her own agent, and upon her own responsibility, a manager or superintendent satisfactory to the corporate appellee, and (b) to use her best efforts to have deposited with the trustee the moneys in default (other than the accelerated principal of the bonds) and to subject the personal property on the premises to the trust indenture. [Tr. 104-105.] Appellant agreed that if she should fail to pay the moneys in default by August 1, 1926, she would make no objection to the immediate sale of the property by the trustee. The corporate appellee on its part agreed that if appellant should pay said moneys by August 1, 1926, and should subject the personal property to the lien of the trust indenture, it

would then use its best efforts to secure a further postponement of the sale to October 6, 1926. [Tr. 105-106.] The language of the agreement in that behalf is as follows:

> "In the event that I comply with my agreements under subdivision (a) of paragraph 2 above, and duly cause to be accomplished and completed the matters provided for in subdivision (b) of said paragraph 2 you will agree to use your best efforts to bring about another postponement of the above mentioned Trustee's Sale until October 6, 1926." [Tr. 106.]

That this language was used advisedly is shown by appellant's express covenant to make no objection to the sale if she should fail to cure her defaults and also by her statement that she expected to make a supplemental loan which would enable her to pay the moneys in default. In this connection she says:

> "I hope, however, soon to be able to negotiate a supplementary loan secured by all or part of said property and with the proceeds thereof to make all payments at the time due under said trust indenture except payments for the principal amount of bonds which have been declared due pursuant to the terms thereof and to obtain clear title to the furniture and equipment now in or upon the property described in said trust indenture as parcel 1." [Tr. 102-103.]

It is clear that appellant never did comply with her covenants expressed in this agreement which would, if performed, have entitled her to a further postponement of the sale. She alleges, in general terms, in paragraph XII of the amended complaint [Tr. 134], that she did all acts

and things necessary to secure such postponement, but later in the very same paragraph, she says that on *August 12, 1926* (not on or bfeore August 1st) she procured and presented Rudolfo Montes who was ready, able and willing, on August 12, 1926, to pay the moneys in default. She does not allege payment, or even tender of the money, and of course the Mexican gentleman who, she says, was ready and able to pay was not presented on or before August first, the date on which she had covenanted to pay, but he made his first appearance a few minutes before the sale which had been again postponed to August 12th, and when he did appear, the best he could offer was another promise to pay *in futuro*. It clearly appears, therefore, that appellant was in default on August 1st, 1926, under the extension agreement, and that she was still in default on August 12th. Accordingly, on August 12, 1926, the trustee sold the property.

In brief, the appellant pleads a standard proposal for a bond underwriting, a standard form of deed of trust, and the execution and delivery of bonds pursuant to a permit of the Commissioner of Corporations, and then admits her defaults thereunder and the foreclosure of the bonds and the sale of the security. It is clear from the amended complaint that appellees, far from bringing any pressure to bear upon appellant, extended her many indulgences in an effort to help her save her property, and that she lost her property only because she defaulted in her obligations.

POINTS AND AUTHORITIES.

The amended complaint does not state a cause of action because fraud is not alleged.

(a) A mere scheme to defraud is not, itself, actionable.

Brown v. Wohlke, 166 Cal. 121;
Prudential Ins. Co. v. Mohr, 185 Fed. 936;
Pollock on Torts, 2nd Ed. p. 23.

(b) The averments relative to the set-up are mere conclusions of the pleader, and not allegations of fact.

Kranz v. Lewis, 100 N. Y. S. 674;
Church v. Swetland, 243 Fed. 289 (C.C.A. 2nd);
Cella v. Brown, 144 Fed. 742 (C.C.A. 8th).

(c) The allegations relative to the sufficiency of appellant's income to meet bond requirements relate to mere expressions of opinion, which are not actionable.

Sawyer v. Prickett, 19 Wall. 146, 22 L. Ed. 105;
Kimber v. Young, 137 Fed. 744 (C.C.A. 8th);
Mandelbaum v. Goodyear Tire Co., 6 Fed. (2nd) 818 (C. C. A. 8th);
Pigott v. Graham, 93 Pac. 435, 48 Wash. 348, 14 L. R. A. (N. S.) 1176.

(1) Particularly as said opinions related to appellant's ability to do certain things.

Schwitters v. Des Moines Commercial College, 199 Ia. 1058, 203 N.W. 265.

(2) And as said opinions related to matters susceptible to simple mathematical computation.

Henry v. Continental Bldg. & Loan Ass'n., 156 Cal. 667;
Keithley v. Mutual L. Ins. Co., 271 Ill. 584, 111 N.E. 503;

Warren v. Federal L. Ins. Co., 198 Mich. 342, 164 N.W. 449;

Donoho v. Equitable L. Ass. Soc., 22 Tex. Civ. App. 192, 54 S. W. 645.

(d) If said opinions be treated as representations, appellant would not have been entitled to rely upon them, because the facts were equally open to her.

12 Cal. Jur. 756;

Dickie v. Steiger, 4 Cal. App. 622;

Boyd v. Blankman, 29 Cal. 19;

2 Kent. Comm. 484;

Slaughter v. Gerson, 13 Wall. 379, 20 L. Ed. 627;

Beckley v. Archer, 74 Cal. App. 598.

Appellant cannot avail herself of the excuse that she did not understand the documents.

Dale v. Dale, 87 Cal. App. 359;

Uptown v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203;

Chicago Ry. Co. v. Belliwith, 83 Fed. 437 (C.C.A. 8th);

Kimmell v. Skelly, 130 Cal. 555.

The general charges and accusations in the amended complaint are at variance with, and controlled by, the facts therein alleged and by the facts set out in the exhibits attached thereto.

31 Cyc. 337;

Murray v. Murphy, 39 Miss. 214;

Williams v. Hanley, 16 Ind. App. 464, 45 N. E. 622;

Bush v. Madeira's Heirs, 14 B. Mon. 172, 53 Ky. 212;

Tec. Bi & Co. v. Chartered Bank of India, Australia and China, 41 Philippine Reports 596;

State v. Risty, 213 N. W. 952;

Anderson v. Inter-river Drainage Dist., 274 S.W. 448.

If fraud be alleged, it affirmatively appears that it has been waived.

(a) The contract being largely executory at the time of the discovery of the alleged fraud, appellant should have taken action at once instead of choosing to go on with the contract.

Kingman v. Stoddard, 85 Fed. 740;

Simon v. Goodyear Met. Rubber S. Co., 105 Fed. 573;

Bement v. LaDow, 66 Fed. 185.

(b) After the discovery of the alleged fraud, appellant made a new contract with respect to the subject matter.

Lee v. McLelland, 120 Cal. 147;

Ruhl v. Mott, 120 Cal. 668.

(c) After discovering the alleged fraud, instead of dealing with appellees at arm's length, appellant asked and obtained favors and extensions to which she was not legally entitled.

Schmidt v. Mesmer, 116 Cal. 267;

Ball v. Warner, 80 Cal. App. 427;

Holcomb & Hohe Mfg. v. Jones, 228 Pac. 968;

Monahan v. Watson, 61 Cal. App. 417;

Tucker v. Beneke, 180 Cal. 588;

Blydenburgh v. Welsh, 3 Fed. Cas. 771; Case No. 1583;

Schagun v. Scott Mfg. Co., 162 Fed. 209.

(d) The alleged representations in the set-up were merged into, and superseded by, the formal documents.

VanWeel v. Winston, 115 U. S. 228, 29 L. Ed. 384;

Andrus v. Smelting Co., 130 U. S. 643, 32 L. Ed. 1054;

Henry v. Bldg. & Loan Ass'n, 156 Cal. 667.

Appellees did not, nor did either of them, stand in a confidential relationship toward appellant.

(a) "In order to burden the defendants with the duties and responsibilities which ordinarily arise out of such a relation, it was incumbent upon the plaintiff, not only to allege his trust and confidence in the defendants, but to aver, if he could truthfully do so, the existence of facts and circumstances showing, or tending to show, that *they voluntarily assumed toward him a relation of personal confidence.*" (*Bacon v. Soule*, 19 Cal. App. 428, 436.)

(b) "The mere statement in the complaint that the plaintiff had unlimited confidence in and relied upon the defendant is not a sufficient statement of the facts to show a confidential relation. The facts must be alleged, from which the court can see that a confidential relation does in fact exist." (*Robbins v. Law*, 48 Cal. App. 555, 561-2.)

(c) There are no facts alleged from which a confidential relationship can be inferred, and the facts alleged require the contrary inference.

Robins v. Hope, 57 Cal. 493;

Ruhl v. Mott, 120 Cal. 668;

Lewis v. Ziegler, 105 Mo. 604, 16 S. W. 862.

The demurrer was properly sustained without leave to amend.

Demartini v. Marini, 45 Cal. App. 418;

Goebel v. Gregg, 57 Cal. App. 651;

Reios v. Mardis, 18 Cal. App. 276;

Loeffler v. Wright, 13 Cal. App. 224; 232-233;

San Joaquin, etc. Co. v. County of Stanislaus, 155 Cal. 21, 29;

Bell v. Bank of Calif., 153 Cal. 234, 244-5;

Foss v. Peoples etc. Co., 241 Ill. 238; 89 N. E. 351.

BRIEF OF ARGUMENT.

The Amended Complaint Is Made Up of Loose General Charges, Amounting Only to Brutum Fulmen and Does Not Allege Fraud with the Particularity Required by Law, or at All.

The only allegation in the amended complaint which undertakes to charge fraud is found in paragraph V. [Tr. 121.] It is there alleged that the appellee, John E. Sutherlin, prepared and presented to appellant a so-called "set-up" showing on the one hand the actual and probable income of plaintiff's property projected over a term of years, and on the other hand a statement of the costs, charges and expenses as well as payments of principal and interest on the bonds, which "set-up" purported to show appellant that she could safely enter into the transaction and carry and pay all of the obligations she would assume under the set-up; but that in truth and in fact said appellee knew that there would be other charges and expenses, not shown on the set-up, which appellant would be obligated to pay; that as a matter of fact these other expenses exhausted appellant's financial resources and, inferentially, made it impossible for her to make her payments on account of bond interest. As already pointed out, we are not favored with a copy of the alleged set-up nor with a statement of what items were intentionally omitted from the set-up, nor a statement of the amount of such items. The allegation is, therefore, altogether too vague to constitute actionable fraud.

In the case of *Kranz v. Lewis,* 100 N. Y. S. 674, the complaint alleged that the defendant, by means of certain false representations induced the plaintiff to enter into a

contract for the purchase of a house and lot and that such false representations consisted in the defendants stating (1) that the property "was rented for more than in fact it was rented", (2) "that the janitor received less per month for his services than in fact he did", etc. The court upheld an order sustaining the general demurrer to the complaint, saying, in the course of its opinion:

> "It is a common rule of pleading that a bare allegation of fraud is an allegation of a conclusion of law, and therefore not issuable. The facts constituting the fraud have to be specifically alleged. The alleged representation that the property was rented for more than it was rented for in fact does not give the necessary facts. The complaint should state in terms just what the representation was—the amount of rent represented as being received, and the extent of its falsity—so that it could be seen not only whether it was false but whether it was material. A difference of one cent or one dollar, or a larger sum, might be immaterial as a matter of law. The representation that the janitor received less for his services than he was in fact paid is open to the same objection of indefiniteness, and is besides obviously immaterial."

It is, of course, elementary that the acts constituting the fraud charged must be stated with particularity.

In *Church v. Swetland*, 243 Fed. 289 (C.C.A. 2nd), the court said at page 299:

> "In pleading fraud it is a well-established rule that the facts relied upon as constituting the alleged fraud must be set out, and not conclusions. A bill seeking relief on the ground of fraud must state the specific facts and circumstances constituting the fraud, and the facts so stated must be sufficient in themselves to show that the conduct complained of was fraudulent. General charges of fraud, or that acts were fraudulently committed, are without avail, unless accompanied by statements of specific facts amounting to fraud. All through this bill may be found general

charges of fraud. It must be made to appear by the facts alleged, independent of mere conclusions, that if the allegations are true a fraud has been committed. An allegation that a thing is fraudulent is immaterial unless the allegation fits the facts to which it is applied."

In *Cella v. Brown,* 144 Fed. 742, (C.C.A. 8th), the court said:

"The mere charge in a bill in equity that by a fraudulent scheme a reorganization of two railroad companies was fraudulently designed by the promotors is a mere *brutum fulmen.* It states no fact representing issuable matter. The allegation is but a conclusion of law by the pleader, and no relief could be administered thereon. (Citing cases.)"

The Mere Existence of a Scheme to Defraud Is Not Actionable in the Absence of Specific Fraudulent Acts.

In an effort to excuse her failure to allege definite facts constituting fraud, appellant has frequently advanced the contention in the lower court that an allegation of the existence of a mere scheme or plan which can be split up into several steps, stages or divisions states a cause of action in fraud if, as a result of that scheme or plan damage is incurred,—quite irrespective of whether or not actionable fraud in the ordinary legal sense is involved in any of the steps or in the scheme as a whole. This contention is not advanced in appellant's present brief and we therefore suppose it is abandoned. Accordingly, we may dismiss this proposition with a bare citation of cases holding definitely that a mere scheme or plan to defraud is not actionable in the absence of specific fraudulent acts:

Bowman v. Wohlke, 166 Cal. 121;
Prudential Insurance Co. v. Mohr, 185 Fed. 936.

Mere Expressions of Opinion or Representations Promissory in Character or Relating to Future Events Are Not Actionable; This Is Particularly True Where the Opinions Expressed Relate to the Ability of the Person to Whom the Representations Are Made to Accomplish the Desired Results, and It Is Also Especially True Where the Subject Matter of the Representations Is Equally Within the Knowledge of Both Parties.

It is obvious that insofar as the "set-up" related to the previous income of the property and to the obligations which appellant was obliged to refund, the information therein contained must have come from the appellant herself. As already pointed out, appellant, in her application for the loan, set out the previous net income of her properties as $5,725 per month, and there is no allegation in the amended complaint indicating that she was not fully informed as to such matters. Any statement as to the sufficiency of the future income was obviously a mere expression of opinion. It did not require a financial "expert" to add up the items of income on the property, figure the interest on $360,000 for one year at seven per cent and do a simple subtraction. These were matters within the comprehension of anyone and capable of demonstration by the simplest arithmetical methods. The statements alleged to have been made by appellees were therefore matters of opinion and not representations of facts, and appellant was not entitled to rely upon such statements. Moreover, it is clear that appellant's ability to make the income of her properties sufficient to pay a certain amount of interest, sinking fund and other charges would depend very largely upon appellant's own man-

agerial ability, upon her success in keeping her apartments rented, and upon her honesty in applying the income received to meet such charges rather than diverting it to other channels.

In *Henry v. Continental Building and Loan Association,* 156 Cal. 667, 105 Pac. 960, the action was against the building and loan association, and the defendant, by way of cross-complaint, set up a cause of action for the foreclosure of a mortgage. Plaintiff alleged that he had secured the loan from the building association upon the common stock purchase plan whereby the monthly installments eventually mature the stock and pay off the loan. It was alleged that the building association had represented to him that by this plan the loan would be paid off in seven years' time, a representation which turned out to be false. The court held that the representations that the stock earnings would take care of the loan would necessarily be dependent upon the future earnings of the stock, that such a representation would be a matter of opinion only and therefore not actionable.

In the case of *Schwitters v. Des Moines Commercial College*, 199 Ia. 1058; 203 N. W. 265, plaintiff brought suit in fraud and deceit, alleging that the defendant had represented to her that "she could complete a course in shorthand and typewriting and obtain a position in eight weeks time under the expert individual instruction" of the defendant school. The court held that the complaint failed to state a cause of action, saying in the course of its opinion:

> "The representation that appellee could complete the course and obtain a position in eight weeks was

no more than a prophecy. It referred only to the future and its fulfillment in the very nature of things depended upon the ability, previous education, industry and application of the student."

In *Kimber v. Young*, 137 Fed. 744, (C. C. S. 8th), it was held:

"In an action for deceit in a sale of corporate bonds, allegations that defendant knew the bonds to be good, and that they would be paid, principal and interest, at maturity, though stated positively as a fact, were mere matters of opinion, the falsity of which was insufficient to create a liability." (Syllabus, par. 3, p. 744.)

Judge Hook, speaking for the court, said in part:

"Again, the representation must be of existing and ascertainable facts, and *not mere promissory statements based upon general knowledge, information, and judgment.* (Citing cases.) It was said in Union Pacific Ry. Co. v. Barnes, *supra: 'An action for false and fraudulent representations can never be maintained upon a promise or a prophecy.' Nor is mere expression of opinion sufficient, though it be false, and be expressed in strong and positive language.* (Citing cases.) Positive statements as to value are generally mere expressions of opinion and as such cannot support an action of deceit. (Citing cases.)" (Pp. 748-749.)

Mandelbaum v. Goodyear Tire etc. Co., 6 Fed. (2nd), 818, (C. C. A. 8th), was an action by a subscriber to stock for damages consisting of the difference between the subscription price and the market price at the time of delivery. The following is from the syllabus:

"Fraud—12—As applied to future, any representation as to assets maintained is without effect.

"Relative to claim of fraudulent representations in prospectus of company for sale of its stock, any

representation as to amount of assets maintained for benefit of preferred stock, as applied to the future, is of no effect." (Syl. point 6, p. 819.)

The following is from the opinion:

"The balance sheet contained in the prospectus and taken from the books of the company, showed, of course, that it had such assets. As applied to the future, the representation would be without any effect in any event. As to the condition existing at the time the stock was sold, no evidence was produced which would indicate that the company and its officers did not believe that the condition of the company justified the representation made (p. 823)."

See, also:

Keithley v. Mutual Life Insurance Company, 271 Ill. 584, 111 N. E. 503;

Warren v. Federal Life Insurance Company, 198 Mich, 342, 164 N. W. 449;

Donaho v. Equitable Life Assurance Society, 22 Texas Civ. App. 192, 54 S. W. 645.

But assuming that the statements charged to appellees were representations and not mere opinions, still appellant had no right to rely on them. Appellant, in her brief (pp. 9, 10, 16 and 17) has cited cases in support of her contention that she was under no duty whatever to make the slightest investigation of any statement made by appellees, but that she was entitled to rely literally on every syllable they uttered and to found a cause of action on any discrepancies which might be discovered. We think it will be found that in none of the cases cited by appellant were the means of information equally accessible to both parties, and in many of them the misrepresentation involved matters in respect to which the party to whom the representa-

tions were made could not, at least without great trouble or expense, have informed himself, and hence was compelled to rely upon the statements which were made to him. Thus, in the case of *Barron v. Woodruff,* 163 Cal. 561, the representations concerned the intricate matter of building costs in which defendant was an expert and plaintiff knew nothing; in *Herdan v. Hanson,* 182 Cal. 538, *Crandall v. Parks,* 152 Cal. 772, and *Groppengeisser v. Lake,* 103 Cal. 37, the representations concerned land situated at such a distance that plaintiff had no opportunity to inspect it; and all of the cases cited on pages 16 and 17 of appellant's brief contain the same element which distinguishes them from the case at bar—namely that for one reason or another all of the knowledge or means of obtaining information were in the hands of the party making the representation and the other party was therefore justified in relying on the statements that were made to him because it was the only thing he could do. In the case at bar, however, the situation is entirely different, because the alleged misrepresentations related to matters with respect to which appellant was as well or better informed than appellees and which were so simple that no technical or expert knowledge or skill was required. The principles applicable are succintly stated at 12 Cal. Jur. 756, in the following language:

> "In general, parties must rely upon their own judgment and investigate before making contracts. Consequently, where there is no relation of especial trust or confidence and where the means of knowledge are at hand and are equally available to both parties, and the subject matter is alike open to their inspection, if one of them does not avail himself of those means and opportunities when he might readily ascertain the

truth by ordinary care and attention, his failure to do so is the result of his own negligence, and he will not be heard to say that he was deceived by the other's misrepresentations. The law affords to everyone reasonable protection against fraud in dealing, but, as has been well said, it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or of careless indifference to the ordinary and accessible means of information; nor does the law prevent one from availing himself of his superior knowledge in dealing with another."

In *Dickie v. Steiger*, 4 Cal. App. 622, the court says:

"Courts cannot measure the mental capacity of every person who enters into a business transaction. There is as much difference in the mental capacities of parties to make contracts or enter into business transactions as in their weight, height or features."

In *Boyd v. Blankman*, 29 Cal. 19, the Supreme Court of California went so far as to say:

"It is proper to remark that we do not concede as much force and consequence as do the counsel for the plaintiff to the fact that Mary Hina was an ignorant Kanaka woman, unacquainted with legal proceedings and almost ignorant of our language. We cannot obliterate the recognized rules of law requiring of all persons the diligence and attention demanded of a prudent man in the transaction of his own business, and establish a measure of care and diligence for each particular case."

Appellant contends that the rule stated in the last citation should not be applied because appellees were "experts" and dealing with a person not on an equal footing, and that therefore, their opinions, even as to future events, constitute a basis of misrepresentations. The fact is, however, that appellees were no more expert than appel-

lant was as to the matter of her own income and that their opinion as to what her income would be is the only definite misrepresentation charged. The fact that in cases similar to some of those cited by appellant at pages 16 and 17 of her brief, the courts have sometimes allowed redress where engineers, lawyers, scientists and the like have misrepresented their findings to a layman, has absolutely no application here. In each such instance the facts underlying the representations were facts peculiarly known only to the more experienced party. In the case at bar the most that can be said for the representations made is that appellees represented that the amount of appellant's income (which she herself had been collecting) would pay a certain amount of interest, other charges and principal on a loan made to fund her debts.

Appellant Cannot Avail Herself of the Excuse That She Could Not Understand the Writings Which She Signed.

Appellant seeks in her brief to make it appear that all of the papers in the loan transaction were handed to her for signature and that she helplessly signed them without understanding their import. We have not been able to find any such allegation in the amended complaint, but even if such fact were alleged, it is no excuse. The courts very properly, and with great uniformity, impose upon parties the duty of reading and understanding the documents they sign. If a person cannot read, or being able to read, cannot understand, it is his duty, before signing a document, to avail himself of the services of someone in whom he has confidence to read the document and explain it; if he does not go this far in his own protection, he cannot complain that he did not understand.

Dale v. Dale, 97 Cal. App. 359, a recent California case upon this point, contains the following language:

> "Under the facts of this case the respondent may not complain because he failed to read or understand the terms of the instrument. This duty was imposed upon his attorney whom he employed to draw the documents. A grantor who executes a deed of conveyance, in the absence of a showing of fraud, or mistake, will not be relieved from the effect of the clear terms of the instrument, merely because he neglected to read it, or even if he is unable to read or understand it. Reasonable prudence requires one to either read the document he proposes to execute, or, if he is unable to do so so, to procure the assistance of someone who can read and explain its terms."

In *Upton v. Tribilcock,* 91 U. S. 45, 23 L. Ed. 203, the action was on an unpaid stock subscription. The defense was that the officers of the company had represented that the stock was non-assessable, and that defendant had not read the charter and by-laws. This was held not to be a defense, the court saying:

> "That the defendant did not read the charter and by-laws, if such were the fact, was his own fault. It will not do for a man to enter into a contract and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission." (Citing cases.) (25 L. Ed. 205.)

To the same effect are:

Chicago, etc., Ry. Co. v. Bellwith, 83 Fed. 437 (C. C. A. 8th), and

Kimmell v. Skelly, 130 Cal. 555.

The cases cited by appellant in this connection (Ap. Br. pp. 13-14) are all cases in which one party imposed on the other, pretending that the agreement which the other was urged to sign was identical with some other agreement previously executed between them. Thus, in *Mazuran v. Stefanich*, 95 Cal. App. 327, 272 Pac. 772, an attorney falsely stated to his prospective clients who could scarcely understand English that his proposed written contract of employment was identical with the parties' oral agreement and required him to perform seven distinct services for them, whereas in fact it mentioned only one. In *Wenzel v. Schultz*, 78 Cal. 223, it appeared that Wenzel's sight was so impaired that he could not read, and that Schultz, his partner in the business covered by the transaction, induced him to sign a note by representing that it was identical with another note previously signed by Wenzel except that the amount payable had been corrected, whereas, in fact, the new note was made payable one day after date instead of the six months maturity provided by the original note. Again, in *Togni v. Taminelli*, 11 Cal. App. 14, it appeared that the parties were partners in the grocery business, and that as an incident to closing out the affairs of the partnership one of them asked the other to sign a document which he stated was a release, whereas, in fact, a deed of grant was concealed in the instrument. And in *Knight v. Bentel*, 39 Cal. 502, an automobile dealer represented to his customer that the contract she was asked to sign was identical with one which she had previously signed, whereas in fact it was very materially different.

It may very well be that all of these cases were properly decided under their particular facts, but those facts were not in any case analogous to the facts in the case at bar.

The General Charges and Accusations in the Amended Complaint Are at Variance With, and Controlled by, the Facts Therein Alleged, and by the Facts Set Out in the Exhibits Attached Thereto.

It has already been shown that fraud is not alleged in the amended complaint, because (a) a scheme to defraud is not, itself, actionable; (b) the averments relative to the set-up are mere conclusions of the pleader, and not allegations of fact; (c) the allegations relative to the sufficiency of appellant's income to meet bond requirements relate to mere expressions of opinion, which are not actionable; and (d) if said opinions be treated as representations, appellant was not entitled to rely upon them, because the facts were equally open to her.

Assuming that the general charges and accusations in the amended complaint, standing by themselves, are sufficient to charge fraud (which, of course, is not conceded), the amended complaint is still insufficient, because the facts alleged in the narrative part of the amended complaint and set out in the exhibits negative fraud.

As heretofore pointed out, it appears from appellant's pleading that appellees loaned appellant $324,000 in cash; that appellant knew the income of her properties and that it was more than sufficient to meet the bond requirements; that appellant read and understood the provisions of the set-up; that appellant's defaults were due to her failure to apply the income of her properties to the bond requirements and the diversion of said income to her own personal uses; that appellees did not crowd appellant for payment after her defaults, but that repeated extensions were given to her; that the foreclosure sale was fairly con-

ducted, and appellant had full opportunity to bid at the sale, but failed to do so; and that appellant never offered to make good her defaults and has never undertaken to redeem the property.

These facts and circumstances obviously negative fraud, and control the loose charges regarding the alleged scheme to defraud, appellant's condition and the set-up contained in the narrative portion of the pleading.

See, also:

31 Cyc. 337;

Murray v. Murphy, 39 Miss. 214;

Williams v. Hanley, 16 Ind. App. 464; 45 N. E. 622;

In *Bush v. Madeira's Heirs,* 14 B. Mon. 172, 53 Ky. 212, the court said:

> "The demurrer admits for the purpose of testing their sufficiency the facts stated in the petition or bill, but the exhibits referred to must be taken into view as controlling any statement which is inconsistent with them, except so far as the exhibits are themselves directly impeached."

The same principle is clearly and simply stated in *Tec. Bi. & Company v. Chartered Bank of India, Australia and China,* 41 Philippine 596, where the Supreme Court of Philippine Islands says at page 605:

> "A general admission of the truth of the allegations set forth in a pleading is not an admission of the truth of an impossible conclusion of fact drawn from other facts set out in the pleading, nor of a wrong conclusion of law based on the allegation of fact well pleaded, nor of the truth of a general averment of facts contradicted by more specific averments. Thus, if a pleader alleges that two pesos

> were borrowed on one day and two more borrowed on another, making five pesos in all, a stipulation of the truth of the allegations in the pleading does not amount to an admission by the opposing party that twice two make five."

In *State v. Risty,* (S. D.), 213 N. W. 952, the gist of the decision is correctly reflected in the headnote, which reads as follows:

> "While, generally, allegation of fraud is an allegation of fact that cannot be disposed of on demurrer, such rule is inapplicable where a complaint, taken as a whole, refutes the allegation of fraud."

In *Anderson v. Inter-river Drainage District No. 1925,* 274 S. W. 448, the decision is also correctly stated in the headnote as follows:

> "On demurrer, petition as a whole is to be looked to and demurrer does not admit as a fact, that which petition contradicts, and a statement made as conclusive or general cannot be held to be unaffected by specific statements which qualify or limit general statement."

Even if There Were Any Fraud, Appellant Waived It by Proceeding With the Transaction After She Discovered the Fraud, by making New Agreements Respecting the Transaction and by Asking and Obtaining Favors and Extensions to Which She Had No Legal Right.

It appears from the amended complaint that long before the execution of the trust indenture and while the entire loan transaction was largely executory, appellant discovered what she alleges to have been the falsity of material representations made by the appellees. In paragraph VII of the amended complaint [Tr. 125] she al-

leges that as early as June 29, 1925, appellees, "contrary to their express promises, statements and representations," required her to pay $5,900 in addition to the items mentioned in the set up. Yet on the same day she executed Exhibit "B", [Tr. 31] increasing the loan and extending it to include the U. S. Island properties, and later executed the trust indenture itself, opened the escrow and went forward with the transaction; still later she asked and obtained the various extensions of time and postponements of the trustee's sale which are set up in Paragraph XIII of the amended complaint. In other words, it is clear that for a long period after the alleged fraud was discovered appellant continued to affirm the contract, to secure modifications and extensions to which she had no legal right, and to conceal any intentions which she may have harbored with reference to an eventual action for deceit. The law applicable to this situation is clearly stated in 12 *Cal. Jur.* at p. 792, Sec. 57, wherein it is stated:

> "Although affirmance of a contract with knowledge of fraud defeats a right of rescission, still an action for damages for the fraud generally exists after such affirmance. But the rule which relieves a party, when he elects to sue for damages, from the acts required of him when he elects to rescind, has the just limitations that, after knowledge of the fraud and election to sue for damages, he must stand toward the other party at arm's length, must comply with the terms of the contract, must not ask favors or offer to perform on conditions which he has no right to exact and must not make any new engagement respecting it; otherwise he waives the alleged fraud."

Schmidt v. Mesmer, 116 Cal. 267. Defendant leased a hotel to plaintiff. In a suit for damages for fraud plain-

tiff alleged that defendant induced the lease by representing that the profits of the hotel had been $750 per month, whereas they had really been only $350. Notwithstanding his knowledge of the alleged fraud, plaintiff continued in possession for a year or more and at the end of that time applied for a reduction of the rent and finally secured an extension of time within which to pay the rent, saying nothing about the fraud. It was held that the conduct of the plaintiff amounted to an affirmance or ratification of the contract and a waiver of the fraud. The court said:

> "It is no doubt the law, that while where a party seeks to rescind a contract into which he was induced to go by the fraudulent representations of another party, he must rescind at once upon the discovery of the fraud, and restore the other party, as near as may be, to his former condition, yet he may elect to go on with the contract, and sue to recover damages for the deceit, without giving any warning to the other party that he intends at some future time to charge him with fraud. This rule, when applied to a continuous contract which runs through a series of years, sometimes, no doubt, works an injustice to the party charged with fraud. It is true that one actually guilty of fraud is not entitled to much consideration; but the real difficulty usually is to determine whether or not the alleged fraud actually existed, and the issue has generally to be determined upon conflicting testimony, and in accordance with the preponderance of evidence. In such a case it is evident that the party who keeps his intended charge of fraud secret for years has a great advantage in preparing for a future intended action, which he alone anticipates, over his adversary, who has had no intimation of such action or such charge of fraud, and has had no reason to preserve or discover evidence concerning it. But this rule, which relieves a party when he chooses to sue for damages from

> many of the acts required of him when he elects to rescind, is subject to some just limitations. If, after his knowledge of what he claims to have been the fraud, he elects not to rescind, but to adopt the contract and sue for damages, he must stand toward the other party at arm's length; he must on his part comply with the terms of the contract; he must not ask favors of the other party, or offer to perform the contract on conditions which he has no right to exact, and must not make any new agreement or engagement respecting it; otherwise he waives the alleged fraud." (pp. 270-271.)

To the same effect are:

Schagun v. Scott Mfg. Co., 162 Fed. 209;

Ball v. Warner, 80 Cal. App. 427;

Holcomb & Hoke Mfg. Co. v. Jones (Okla.) 228 Pac. 968;

Monahan v. Watson, 61 Cal. App. 417, 214 Pac. 1002;

Tucker v. Beneke, 180 Cal. 588;

Lee v. McClelland, 120 Cal. 147;

Blydenburgh v. Welsh, (U. S. C. C. A., Pa. 1831), 3 Fed. Case 771, Case No. 1583.

It is also very generally held that where the contract is wholly or largely executory at the time of the discovery of the fraud, the defrauded party must take action immediately and refuse to go further with the contract; otherwise, the fraud is waived, *"Volenti non fit injuria."*

See:

Kingman v. Stoddard, 85 Fed. 740;

Simon v. Goodyear Metallic Rubber Shoe Co., 105 Fed. 573;

Bement v. La Dow, 66 Fed. 185.

Furthermore, the set-up was merely a part of the preliminary negotiations, and was merged in, and superseded by, the formal documents. This plainly appears from the informal character of the set-up, consisting, as it did, "of a series of figures and pencil memoranda on scratch paper" [Tr. 122], and the fact that in the application for the loan agreement appellant expressly represented her income as far in excess of any figure necessary to take care of the bond requirements. [Exhibit "C", Tr. 32.]

In *VanWeel v. Winston*, 115 U. S. 228 (29 L. Ed. 384), the case arose on a bill in equity charging fraudulent representations affecting the character and value of the security on which the bonds in question were negotiated. The following is from the opinion:

> "* * * It (the bill) is full of the words fraudulent and corrupt, and general charges of conspiracy and violation of trust obligations. Mere words, in and of themselves, and even as qualifying adjectives of more specific charges, are not sufficient grounds of equity jurisdiction, unless the transactions to which they refer are such as in their essential nature constitute a fraud or a breach of trust, for which a court of chancery can give relief." (29 L. Ed. 384.)
>
> * * * * * * * *
>
> "Whatever representations may have been made in the circulars of the Company was, according to all rules of evidence, superseded by this solemn instrument between the parties. If they differed in any respect, the latter must be looked to as the security on which the bondholders alone had the right to rely. This instrument, so far from giving any pledge or assurance that the branch road should be fifty miles long, or near that, is careful to say it shall not exceed that length. The limitation is in its length, not its

shortness. The latter is provided for by saying that it should be by the most practicable route." (29 L. Ed. 386.)

In *Andrus v. Smelting & Refining Company,* 130 U. S. 643 (32 L. Ed. 1054), the action was at law for fraud and deceit. The following is from the opinion:

"In the second place, the covenant in the deed for quiet possession merged all previous representations as to the possession, and limited the liability growing out of them. Those representations were to a great extent, if not entirely, mere expressions of confidence in the company's title, and the right of possession which followed it, against all intruders. The covenant was an affirmance of those statements in a form admitting of no misunderstanding. It was the ultimate assurance given, upon which the plaintiff could rely, a guaranty against disturbance by a superior title." (32 L. Ed. 1056.)

In *Henry v. Continental Bldg. etc. Ass'n,* 156 Cal. 667, it was alleged that the respondents were induced to execute the notes and mortgages in suit through misrepresentation. The following is from the opinion:

"But, conceding that the language of the circulars involved an unqualified declaration of a fact and was reasonably susceptible of the interpretation which the respondents undertake to give it, and that they could well have conceived an understanding of its import which they claim to have received from it, the fact remains that the note and mortgage, constituting the contract to whose terms they bound themselves, contain in detail in clear and unambiguous language the terms, conditions and obligations which they assumed. The plaintiff, Simon Henry, testified that he read the mortgage before signing it, and presumably he understood its terms and conditions and well knew the full scope of the contract to which he made himself a party. It is, I think, well settled that oral or printed

statements made by officers or agents of a building and loan association in contradiction of the plain language of the contract, whether relied upon by the person to whom made or not, cannot be made the basis of an estoppel. (Noah v. American etc. Assoc., 31 Ind. App. 504, (68 N. W. 615); McNamara v. Oakland etc. Assoc., 131 Cal. 337 (63 Pac. 670).)

"There is, as suggested, no obscurity in the language of either the note or mortgage. The latter, among other things, plainly provides that sixty cents per share shall be paid each month and 'until the said shares are fully paid by the said payments and the dividends and accumulations on said shares.' I am unable to comprehend how a person, capable of transacting business for himself, could well misapprehend this language. In fact, the language of both the note and mortgage prescribing the conditions and explaining the methods by which the business between the parties was to be conducted is so clear that even the plaintiffs must have understood that nothing more than an approximation could be made as to the length of time which would probably be required for the stock to mature and the debt to be liquidated." (Pp. 675-676.)

Appellees Did Not Sustain a Confidential Relationship Toward Appellant, as Such a Relationship Is Not Alleged, Nor Are Any Facts Alleged From Which It Could Be Inferred.

It is pointed out in our statement of the case that there is no foundation in the amended complaint for the claim made in appellant's brief that appellees stood in a confidential relationship toward appellant. It is not expressly alleged that appellees, or either of them, *voluntarily* assumed such a relationship, nor are any facts set up which would justify any such inference. Appellant merely alleges that she was so "greatly troubled" by the condition

of her husband that "she was not then possessed of even her normal ability to grasp, understand and appreciate" the figures and statements presented in the negotiations, and "so explained" to appellees. [Tr. p. 120.] It does not appear that appellees had been close friends of appellant, or that she had known them for a long time, or that she placed any particular degree of confidence in them. Appellees were strangers to appellant and obviously on the opposite side of a business transaction.

The mere fact that a party to a business transaction explains to the other party that he is ill does not raise a confidential relationship, nor does the reliance by one party on the other raise such a relationship.

In *Bacon v. Soule,* 19 Cal. App. 428, the court says at page 436:

> "In order to burden the defendants with the duties and responsibilities which ordinarily arise out of such a relation it *was incumbent upon the plaintiff not only to allege his trust and confidence in the defendants, but to aver, if he could truthfully do so, the existence of facts and circumstances showing or tending to show that they voluntarily assumed toward him a relation of personal confidence.*"

In *Robbins v. Law,* 48 Cal. App. 555, plaintiff relied upon a breach of confidential relationship for redress. Briefly, the allegations were that plaintiff reposed trust and confidence in the defendant, and the defendant thereby gained a great influence and control over plaintiff, and in many ways dominated the plaintiff's thoughts, and that the plaintiff had not stood on an equal footing with defendant. At pages 561 and 562, the court said:

> "The direct general allegations of the complaint, paragraph IV, subdivision a, h, and i, faithfully copy

some of the usual descriptive definitions of confidential or fiduciary relations, or relations of trust and confidence. *But the mere statement in the complaint that the plaintiff had unlimited confidence in and relied upon the defendant is not a sufficient statement of the facts to show a confidential relation.* The facts must be alleged, from which the court can see that a confidential relation does in fact exist."

In *Robins v. Hope,* 57 Cal. 493, the plaintiffs sought to avoid a certain deed which they asserted had been procured by the defendant's testator by means of fraud, and that the fraud was more easily perpetrated because of the confidential relations existing between the parties. The defendant's demurrer to the complaint was sustained. The plaintiff electing to stand upon the complaint, judgment was entered for the defendants, from which judgment the appeal was taken. The Supreme Court affirmed the judgment, and with respect to the question of confidential relations had the following to say at pages 496-497:

"It will thus be seen that it is only upon the question of the relations which existed between the parties that the court below and the learned counsel for the appellants differ. The court held that the relation of Hope to the appellants was that of a stranger. The counsel insists, if we do not mistake his position, that conceding that to be so, the deed was procured through the misrepresentations of Hope's agents, between whom and the appellants confidential relations did exist, and the transaction must therefore be viewed in the same light as it would be if such relations had existed between Hope and the appellants, and he, instead of said agents, had made the misrepresentations complained of. Whether under the maxim, *qui facit per alium facit per se,* a principal must be held to adopt the relations which exist be-

tween his agent and those with whom he is transacting business through such agent, may well be doubted. But does it appear that confidential relations did exist between Hope's agents and the appellants? One of those agents was Albert Packard, a practicing lawyer, and he, some three or four weeks prior to the execution of the deed which the appellants seek to avoid, 'visited Z. Branch, the father of F. Branch, then and now being the husband of the said plaintiff, Conception Branch, at their place of residence in the County of San Luis Obispo, and also said Encarnacion (the mother of the plaintiffs), all of whose confidence he possessed to an almost unlimited extent, and over whom he exercised a great influence,' and then and there made the misrepresentations complained of, to the persons above named, who repeated them to the plaintiffs. Now it is alleged that Z. Branch and F. Branch—one the father-in-law and the other the husband of one of the plaintiffs (four of the five plaintiffs are married women), and the mother of the plaintiffs, had almost unlimited confidence in said Packard, and that he exercised great influence over them. Does that show that a confidential relation existed between Packard and the appellants, or even between him and the three persons to whom he directly made the alleged misrepresentations?

The phrases "confidential relation' and 'fiduciary relation' seem to be used by the courts and law writers as convertible terms. It is a peculiar relation which undoubtedly exists between 'client and attorney, principal and agent, principal and surety, landlord and tenant, parent and child, guardian and ward, ancestor and heir, husband and wife, trustee and *cestui que* trust, executors or administrators and creditors, legatees or distributees, appointer and appointee under powers, and partners and part owners. In these and the like cases the law, in order to prevent undue advantage from the unlimited confidence, affection, or sense of duty which the relation naturally creates, requires the utmost degree of good faith

(uberrima fides) in all transactions between the parties.' (1 Story's Eq. Jur. 218.) If there is an allegation of the existence of any peculiar relation between Packard and the appellants, or between him and the persons to whom he is alleged to have made misrepresentations respecting the title of the appellants to the land which they conveyed to Hope, it has escaped our observation. There is nothing peculiar in the alleged relation between Packard and the persons to whom he is alleged to have made misrepresentations, and it is not alleged what relation if any existed between him and the appellants. *It is alleged generally that the persons to whom he made the misrepresentations had almost unlimited confidence in him, and that he had great influence over them, but why that was, or would naturally be so, is not apparent. Certainly no relation is shown to have existed between him and them from which the law would infer such confidence and influence."*

In the case of *Ruhl v. Mott,* 120 Cal. 668; the defendant appealed from the judgment and from an order denying his motion for new trial. The Supreme Court reversed the judgment and order. The plaintiffs sought to enforce a rescission of an executed contract for the purchase and sale of agricultural lands, in which he was the vendee. His relief was based in part upon a breach and abuse of confidential relations existing between the parties, and also upon weakness of mind of the plaintiff induced by sickness and intoxication, of which defendant took advantage. In brief, the complaint stated that the plaintiff was a bookbinder by occupation and obtained a considerable portion of his business from the printing and stationery house of H. S. Crocker & Company, of which defendant was a member; that the plaintiff went to the defendant expressing his desire to purchase a piece of land suitable for horticultural purposes, and that the

defendant induced him to purchase defendant's ranch by means of artifice and fraud.

The averment of the plaintiff with relation to confidential relationship was merely that plaintiff was sick and unable to resist defendant's importunities. The finding of the trial court in this respect was that plaintiff, though physically sick, continued to transact business. At pages 678-679, the court said:

> "Nor can his ignorance be palliated or excused because of the alleged confidential relations which existed between plaintiff and defendant, or because of plaintiff's alleged weakness of mind.
>
> "The court does not find that he was of weak mind, and plaintiff's own testimony as to other land transactions, and the uniform financial success with which he met in his speculations, negatives the idea that he was of feeble intellect. The confidential relationship is found by the court in the following language: 'One-half or more of all the business done by plaintiff came from the defendant, as manager of the firm of H. S. Crocker & Co., and, as a result of the relation between them, plaintiff reposed great confidence in defendant, trusted him, and relied upon him for advice.' But this finding is not sufficient to establish the confidential relationship defined in section 2219 of the Civil Code, so as to charge the defendant with the high duties pertaining to a trustee, and to shift the burden of proof to show the unfairness of the transaction from the plaintiff, where it naturally rests, to the shoulders of the defendant, and compel the latter to establish the fairness of the sale. It is to be remembered that plaintiff was himself a business man, had bought and sold real estate, and was contracting with the Crocker Company, of which defendant was a manager. *The fact that he reposed confidence in the defendant did not cast any duty upon the latter, unless he 'voluntarily assumed a relation of personal confidence' with*

plaintiff, and this is not found. Equity always views with strictness the business dealings of a man with one who stands in a position of dependence or confidence to him, when that relationship is either voluntarily assumed or is imposed by operation of law. But it would indeed be an anomaly if one dealing with a vendor of land should be allowed to shut his eyes and ears and making no use of his faculties in determining the value of the property he purchased, thereafter excuse himself by saying that he reposed confidence in the vendor. He may in fact have done so, but the fact does not establish a confidential relation as known to law, and for his trusting folly neither law nor equity can afford him redress."

The case of *Lewis v. Zeigler*, 105 Mo. 604, 16 S. W. 862, was one wherein it was sought to declare defendant trustee for plaintiff in purchasing the property then in question. Among other things, it was charged that the defendant breached the confidence reposed in him by plaintiff. The judgment for defendant was affirmed, the court saying at pages 607-608:

"The charge in the petition upon which plaintiff bases her right to relief is that she was uneducated and ignorant; that before she moved to St. Louis she lived near defendant, frequently worked for the family, went to him for advice, and reposed great confidence in him; that about the time the partition suit was commenced she placed the property in his charge for renting, paying taxes, and looking after generally, and that he agreed in case the property did not sell at partition sale for more than $200 to buy it in for her.

"We think there can be no doubt from the evidence that plaintiff, who was a colored woman, was ignorant, uneducated and confiding, and when she lived in Ste. Genevieve was frequently employed in plaintiff's family as a domestic, and that she had great confidence in the integrity and ability of de-

fendant and his willingness to advise and assist her. The property sold for only about one-half its actual value.

"There can be no doubt that if confidential relations had been shown to exist between these parties in reference to the management and sale of his property, or if they had dealt directly with each other, the inequality in their business capacity and the relations between them would call for the closest scrutiny, and, if any unfairness or breach of confidence was manifest, a court of equity would interfere to require that to be done which in equity should have been done. We do not think the rule would go to the extent of creating a trust in the purchaser from the mere facts of the inequality, and that confidential relations between the parties had existed generally seven or eight years previous to the transaction and had no connection with the particular matter about which complaint was made.

"A careful examination of the evidence fails to satisfy us that defendant occupied such a relation of confidence to plaintiff as would as would preclude him from bidding in his own interest at the public sale of this land."

The cases cited by appellant (Appellant's Br., pp. 6-7) are not in point.

In *Cox v. Schnerr*, 172 Cal. 371, an action to cancel a deed on the ground of fraud and undue influence, it appeared that the grantee had for many years been the close friend and confidential advisor of decedent, had handled her properties for her and had been intrusted with legal titles to her properties. In view of the great confidence reposed in the grantee and of his long continued relationship with the grantor, the burden was very properly placed upon the grantee to show the *bona fides* of the transaction. In *Ross v. Conway*, 92 Cal. 632, which was like-

wise an action to cancel deeds obtained by undue influence, it appeared that the grantee was a pastor and that the grantor was one of his parishioners; that he had been her spiritual advisor for many years and that she was a woman of weak mind and about to die. Here, again, the burden was very properly placed upon the grantee of showing the good faith of the transaction. In *Odell v. Moss,* 130 Cal. 352, a similar action, it appeared that the defendant had obtained a deed from her brother, who given to over-indulgence in intoxicating liquor, who was weak-minded and who, shortly after the execution of the deed, was adjudged incompetent. It appeared that for many years the brother had reposed unusual confidence in his sister, that she had looked after his properties for him and that on various occasions she had declared that she held the property in trust for him.

Leave to Amend a Complaint Is Properly Refused Where, as in the Case at Bar, It Is Apparent That Plaintiff Cannot State a Cause of Action, Especially Where Repeated Attempts to State a Cause of Action Have Resulted in Failure.

This proposition of law is too well settled to require any extended discussion. We merely cite the following cases as illustrating the principle:

Demartini v. Marini, 45 Cal. App. 418;
Goebel v. Gregg, 57 Cal. App. 651;
Reios v. Mardis, 18 Cal. App. 276;
Loeffler v. Wright, 13 Cal. App. 224;
San Joaquin etc., v. County of Stanislaus, 155 Cal. 21;
Bell v. Bank, 153 Cal. 234;
Foss v. Peoples Co., 241 Ill. 238; 89 N. E. 351.

In this connection, we again call the court's attention to the stipulation set out on page 162 *et seq.* of the transcript, from which it appears that the amended complaint in this case is the second effort in the fifth suit, in the same court, to distort a transaction which appellant's own exhibits show to be bona fide.

Respectfully submitted.

JOSEPH L. LEWINSON
L. R. MARTINEAU, JR.
WARREN STRATTON
Attorneys for Appellees.

No. 6174

United States
Circuit Court of Appeals
For the Ninth Circuit.

JUNG LIN,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Petitioner and Appellant:

JOSEPH P. FALLON, Esq., 550 Montgomery St., San Francisco, California.

For Respondent and Appellee:

UNITED STATES ATTORNEY, San Francisco, Calif.

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 20,233—K.

JUNG LIN,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

Sir: Please issue for transcript on appeal the following papers, to wit:

1. Petition for writ of habeas corpus.
2. Order to show cause.
3. Exhibit "A" (Findings of Board of Special Inquiry).
4. Exhibit "A" (Findings of Board of Review).

5. Appearance of respondent and notice of filing excerpts from the original immigration record.
6. Respondent's memorandum of excerpts of testimony from the original immigration record.
7. Minute order denying writ of habeas corpus.
8. Notice of appeal.
9. Petition for appeal.
10. Assignment of errors.
11. Order allowing appeal.
12. Order transmitting original exhibits.
13. Citation on appeal.
14. Praecipe.
15. Clerk's certificate.

JOSEPH P. FALLON,
Attorney for Appellant.

[Endorsed]: Filed Jun. 3, 1930. [1*]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 20,233—K.

In the Matter of JUNG LIN, on Habeas Corpus, #28591/2–4 ex SS. "Tenyo Maru," Nov. 24, 1929; Daughter of Native.

*Page-number appearing at the foot of page of original certified Transcript of Record.

PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable United States District Judge, Now Presiding in the United States District Court, in and for the Northern District of California, Second Division:

It is respectfully shown by the petition of Jung Woh that Jung Lin, hereafter in this petition referred to as the "detained," is unlawfully imprisoned, detained, confined and restrained of her liberty by John D. Nagle, Commissioner of Immigration for the port of San Francisco, at the immigration station at Angel Island, County of Marin, State and Northern District of California, Southern Division thereof; that the said imprisonment, detention, confinement and restraint are illegal and that the illegality thereof consists in this, to wit:

That it is claimed by the said Commissioner that the said detained is a Chinese person and alien not subject or entitled to admission into the United States under the terms and provisions of the Acts of Congress of May 5, 1882, July 5, 1884, November 3, 1893, and April 29, 1902, as amended and reenacted by Section 5 of the Deficiency Act of April 7, 1904, which said acts are commonly known and referred to as the Chinese Exclusion or Restriction Acts; and that he, the said Commissioner, intends to deport the said detained away from and out of the United States to the Republic of China. [2]

That the Commissioner claims that the said detained arrived at the port of San Francisco on or

about the 24th of November, 1929, on the SS. "Tenyo Maru," and thereupon made application to enter the United States as a citizen thereof by virtue of being the foreign-born daughter of your petitioner's deceased father, Jung Ock, a native-born citizen of the United States, and that the application of said detained to enter the United States as a citizen thereof was denied by said Commissioner of Immigration and a Board of Special Inquiry, and that an appeal was thereupon taken from the excluding decision of said Commissioner of Immigration and said Board of Special Inquiry to the Secretary of the Department of Labor, and that said Secretary thereafter dismissed said appeal; that it is claimed by said Commissioner that in all of the proceedings had herein the said detained was accorded a full and fair hearing; that the action of said Commissioner and said Board of Special Inquiry and said Secretary was taken and made by them in the proper exercise of the discretion committed to them by the statutes in such cases made and provided, and in accordance with the regulations promulgated under the authority contained in said statutes.

But, on the contrary, your petitioner alleges upon his information and belief that the hearing and proceedings had herein, and the action of the said Board of Special Inquiry and the action of said Secretary of Labor was and is in excess of the authority committed to them by the said rules and regulations and by said statutes, and that the denial of said application of said detained to enter the

United States as a citizen thereof by virtue of being the foreign-born daughter of your petitioner's deceased father, Jung Ock, a native-born citizen of the United States, was and is an abuse of the authority committed to them by said statutes, and in this behalf your petitioner alleges:

That the said detained, Jung Lin, is the blood daughter of Jung Ock, now deceased, who was by reason of his birth therein a [3] citizen of the United States; that the citizenship of the said Jung Ock is conceded and the detained as his blood daughter is a citizen of the United States by virtue of Section 1993, Revised Statutes of the United States; that the detained was accorded upon her application for admission a hearing before a Board of Special Inquiry and was denied admission; that your petitioner alleges upon his information and belief, and therefore alleges the fact to be, that the sole ground for the excluding decision of the immigration officials was the dispute that arose at the aforesaid hearing as to what Chinese dialect the detained was speaking in answer to the questions propounded to her in the Chinese language. It was alleged that the detained spoke a different Chinese dialect than the dialect spoken by her four brothers who testified as to the relationship of themselves to the detained and their common father, Jung Ock; that your petitioner alleges that there is no difference in the Chinese dialect spoken by the detained and the aforesaid brothers, and further alleges that the official Chinese interpreters who questioned the detained themselves differed in their

opinion on the point in question; one asserted that she spoke a mixed dialect; one that she spoke Sam Yup and others that she spoke various other dialects; that the detained when informed that she did not speak the See Yip Hoy Ping dialect answered: "There are many dialects spoken in the Hoy Ping District and I have always spoken the same dialect I am speaking now." That to deny the detained admission on such alleged evidence is to deny her admission on evidence that is mere conjecture, and such is not sufficient in law to warrant any such arbitrary action on the part of the aforesaid immigration officials.

That the testimony taken upon said hearing was voluminous and no discrepancies of any moment were developed; that the summary of the Board of Special Inquiry is attached hereto, made a part hereof and marked Exhibit "A"; that there is also attached hereto, made a part hereof and marked Exhibit "B," a copy of the brief filed by [4] A. Warner Parker, Esq., Attorney at Law, Washington, D. C., who represented the applicant before the Department of Labor.

That upon the hearing had before the immigration officials respecting the right of admission of the detained, your petitioner, his three brothers, and the detained testified as to the relationship existing between them and their father, Jung Ock; that the oral testimony and documentary evidence introduced and submitted upon behalf of the said detained at the aforesaid hearing was of such a conclusive kind and character and was of such

legal weight and sufficiency, that it was an abuse of discretion on the part of said Board of Special Inquiry and said Secretary of Labor not to be guided thereby, and the said adverse action of said Commissioner and said Board and said Secretary was, your petitioner alleges upon his information and belief, arrived at and was done in denying the detained the fair hearing and consideration of her case to which she was entitled. Said action was in excess of the discretion committed to the said Secretary, said Board and to said Commissioner of Immigration. Your petitioner further alleges upon his information and belief that said action of said Secretary, said Commissioner and said Board was influenced against said detained and against her witnesses solely because of their being of the Chinese race.

Your petitioner alleges upon his information and belief that the evidence presented before the Board of Special Inquiry was of such a positive kind and character that to refuse to be guided thereby was an abuse of discretion and in violation of the decision of the Circuit Court of Appeals in Ex parte Johnson vs. Leung Fook Young, 16 Fed. (2d) 65, and finally Johnson vs. Ng Wah Sun, 16 Fed. (2d) 11, and in violation of the Court of Appeals in this, the 9th Circuit, in Go Lun vs. Nagle, 22 Fed. (2d) 240, and in the case of U. S. vs. Brough, 22 Fed. (2d) 926, cited in the Circuit Court of Appeals for the Second Circuit in New York, and in the case of Wong Tsick Wye and Wong Moon Quong vs. Nagle, 33 Fed. (2d) 226, Circuit [5]

Court of Appeals for the Ninth Circuit, and In re Gong You vs. Nagle, 34 Fed. (2d) 848; and In re Jue Mook vs. Tillinghast, 36 Fed. (2d) 39, First Circuit Court of Appeals (recent decision).

Your petitioner alleges upon his information and belief that the said detained has been denied a fair hearing and that there is no supporting evidence to be found in the said immigration record to support the adverse action of the said immigration authorities and that said decision is against evidence of such a positive kind and character that it was a manifest abuse of discretion.

That your petitioner has not within his possession nor within his control, or is it possible for him to obtain a copy of the original immigration record in said matter to file with this petition, save and except a copy of the summary of the Board of Special Inquiry's decision, filed in the duplicate immigration record now at Angel Island, heretofore referred to; that your petitioner has not therefore a copy of the record to present with this petition, but stipulates that the immigration service record may be admitted in evidence with the same force and effect as if filed with this petition.

That it is the intention of said Commissioner of Immigration to deport the detained out of the United States and away from the land of which she is a citizen by the SS. "Shinyo Maru," sailing from the port of San Francisco March 22d, 1930, at 12 o'clock noon, and unless this court intervenes to prevent said deportation the said detained will

be deprived of residence within the land of her citizenship.

That said detained is in detention at the Immigration Station at Angel Island, County of Marin, and cannot for said reason verify said petition upon her own behalf, and said petition is therefore verified by your petitioner, brother of said detained, upon her behalf.

That said Jung Lin, the detained person, has exhausted all her [6] rights and remedies and has no further remedy before the Department of Labor, and unless the writ of habeas corpus issue out of this court as prayed for herein, directed to John D. Nagle, Commissioner as aforesaid, in whose custody the body of said Jung Lin is, said Jung Lin will be deported from the United States to China without due process of law.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue herein as prayed for, directed to the said Commissioner, commanding and directing him to hold the body of the detained within the jurisdiction of this court, and to present the body of said detained before this court at a time and place to be specified in said order, together with the time and cause of her detention, so that the same may be inquired into, to the end that the said detained may be restored to her liberty and go hence without day.

Dated: San Francisco, California, March 19th, 1930.

JOSEPH P. FALLON,
Attorney for Petitioner and Detained.

State of California,
City and County of San Francisco,—ss.

Jung Woh, being first duly sworn, deposes and says:

That he is the petitioner named in the foregoing petition; that he has heard said petition read and explained and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes them to be true.

(Chinese Characters)
JUNG WOH.

Subscribed and sworn to before me this 19th day of March, 1930.

[Seal] HARRY L. HORN,
Notary Public in and for the City and County of San Francisco, State of California. [7]

EXHIBIT "A."

JUNG LIN, Daughter of Native, #28591/2–4 ex SS. "Tenyo Maru," November 24, 1929.
December 24, 1929.

SUMMARY.

By CHAIRMAN:

The alleged father of this applicant, Jeung (Jung) Ock (Duck) or Jung Ying Bing, claimed to have been born in San Francisco, Cal., in T. C. 10–9–28 (Nov. 10, 1871). He made six trips to China that are on record in his file No. 12017/27772. He first

claimed to have been married on Jan. 4, 1906, when he was being examined prior to readmission to the United States after his first recorded trip to China. At that time he stated that he was married to Leung Shee, then aged 20, during the 8th month of 1905, or about September, 1905. Unfortunately at that time he was not questioned regarding his family status. The first mention of any children occurs when he was examined at Angel Island on August 6, 1910. At that time he confirmed his previous statement of marriage and stated further that he had two boys and one girl, describing them as "Jeung Jick, born K. S. 32–7–20 (Sept. 8, 1906), Jeung Wah, born S. T. 2–5 (June, 1910), and Jeung Lin 6, born K. S. 31–6–4 (July 6, 1905)." From this it is apparent that the essential trip in this case must have been the first one on record when the alleged father departed from San Francisco via the SS. "Korea" on Nov. 18, 1903, and returned via the SS. "America Maru" on Jan. 3, 1906. Since that time he has consistently maintained the same name and birth date for the present applicant with one exception, when he claimed her birth date to be K. S. 32–6–10 (July 30, 1906). It is to be noted that all five principals in the case claim that their alleged father died on September 26, 1926.

In so far as the family history and description of the native village are concerned all five principals are in fairly good agreement. But there is nothing remarkable in this since any person of fair intelligence and memory could easily be coached to the extent of knowing such matters fairly well

and being able to recite answers to given questions glibly and convincingly. Numerous coaching documents now in the possession of this station indicate how minutely Chinese applicants for admission have been prepared in the past. Certain discrepancies should be noted. The applicant claims that both of her maternal grandparents died before she was born. Her oldest brother, Jung Juck, claims that both maternal grandparents are now living. Her second brother, Jung Woh claims that both maternal grandparents are dead. Her third brother, Jung Share, claims that his maternal grandfather is now living, but that his maternal grandmother is dead.

The applicant and her brothers, Jung Juck, Jung Share and Jung Som, all claim that two meals a day were eaten in their home in the kitchen on the south side. The brother Jung Woh claims that three meals a day were eaten and that they were always eaten in the parlor of the house.

The applicant claims that the stove in the south kitchen which was used for cooking purposes was furnished with a terra cotta flue chimney. All of her alleged brothers claim that the stove was not furnished with any chimney.

The applicant claims that the road leading from her village to Gung Hing Market is paved all the way, while her brothers Jung Juck and Jung Woh both claim that this road is a dirt road. [8]

All five principals in this case are comparatively young people and have all been in the home village within very recent time. None of them could rea-

sonably claim impairment of memory or lack of familiarity with home village and family circumstances due to lapse of time. There should, therefore, have been much better agreement among them concerning the discrepancies above noted. However, the circumstance that looms up as being most damaging to the applicant's case is the fact that she does not speak the See Yip dialect of the Hoy Ping district as she claims. All of the interpreters who acted in her behalf remarked upon the fact that she was not testifying in the See Yip dialect of the Hoy Ping district and two of these interpreters, Lee Park Lin and Harry K. Tang, both of whom are exceptionally well qualified to judge in such matters through their long experience as interpreters and intimate knowledge of numerous Chinese dialects, have stated very positively that she does not speak the See Yip dialect of the Hoy Ping district, but another dialect which is partly Cantonese or closely akin thereto. This would indicate that the applicant does not come from the Hoy Ping district as she claims. She testified that she had never been away from the home village all of her life with but one exception, when she was sent to Canton for a period between 10 and 20 days. It is obvious that even if she could learn to speak Cantonese in so short a time it could not have influenced her dialect to such an extent that she would completely forget the dialect that she should have been speaking all the rest of her life. It should be noted that the attitude of the applicant throughout the hearing was not good. She maintained a

sullen furtive air throughout the hearing and most of her answers were given in a hesitating manner, somewhat like that of a school child trying to answer a previously prepared lesson.

From the evidence adduced in this case I am of the opinion that this applicant has not reasonably established the claimed relationship and I therefore move that she be denied admission to the United States and deported to China, the country from which she came.

By Member DAVIS.—I second the motion.

By Member MORRIS.—I concur. [9]

EXHIBIT "A."

February 3, 1930.

SUMMARY.

CHAIRMAN: (LESTER COLE.)

This applicant was denied admission to the United States on Dec. 26, 1929. This denial was based mainly upon the fact that the applicant did not speak the See Yip Hoy Ping dialect. She claimed as her own dialect the See Yip Hoy Ping. She claims to be about 25 years of age and to have lived in the See Gew village, Hoy Ping district, all of her life with the exception of some 20 days when she went to visit a friend in Canton City. All of the interpreters who have acted in this case are agreed that this applicant does not speak the See Yip dialect of the Hoy Ping district. It should be noted that her alleged brother Jung Woh, who appeared at the present hearing, has been away

from the home village ever since he was 5 years of age and yet is found to speak the See Yip Hoy Ping dialect, which is the dialect that he learned as a child.

On Jan. 30, 1930, this applicant was ordered deported. On Jan. 31st Commissioner General Hull ordered this case reopened in order that a test might be made of the dialect spoken by the applicant's alleged brothers and a comparison made with the dialect spoken by the applicant. This was done in to-day's hearing. Only two of the applicant's alleged brothers, Jung Juck and Jung Woh, appeared at the hearing. The appearance of the other two brothers who originally testified at Los Angeles was especially waived at this hearing.

The applicant and the two alleged brothers who appeared here to-day were questioned by three of our ablest interpreters, all of whom are men well qualified by experience to test and compare dialectic variations. All of these interpreters agreed that the applicant did not speak the See Yip Hoy Ping dialect and further that she did not testify in the same dialect that was used by her alleged brothers. There is attached hereto a sheet marked Exhibit "D," containing eight questions written in Chinese by interpreter H. K. Tang. There is also attached a sheet marked Exhibit "E," containing the same eight questions with the English pronunciation of the words in the Sam Yup and See Yip Hoy Ping dialects. Each of the alleged brothers was asked to slowly read these eight sentences. They did so. It is to be noted in this connection that the oldest

alleged brother, Jung Juck, attempted to disguise his dialect when reading these eight sentences. The other alleged brother pronounced them in his native dialect without any attempt to change or disguise. With the English pronunciation before me I was able to note the difference between Jung Juck's pronunciation of the words and Jung Woh's pronunciation of the words and I agree with the interpreters in stating that it was quite apparent that Jung Juck was trying to pronounce the words of the eight sentences in a different manner from what was given as the correct See Yip Hoy Ping pronunciation. It should be noted also that Jung Woh seemed to be rather confused about the simple question as to what was his birth date. It seems to me that almost any person, illiterate or otherwise, should be reasonably certain of his birth date. From the additional evidence adduced in to-day's hearing I am still of the opinion that the claimed relationship has not been reasonably established and I therefore move that this applicant be denied admission to the United States and deported to China, the country from which she came.

Member DAVIS.—I second the motion.

Member HECHT.—I concur.

[Endorsed]: Filed Mar. 21, 1930. [10]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

Good cause appearing therefor, and upon reading the verified petition on file herein,—

IT IS HEREBY ORDERED that John D. Nagle, Commissioner of Immigration for the port of San Francisco, appear before this court on Monday, the 14th day of April, 1930, at the hour of 10 o'clock A. M. of said day, to show cause, if any he may have, why a writ of habeas corpus should not be issued herein as prayed for, and that a copy of this order be served upon the said Commissioner and a copy of the petition and said order be served upon the United States Attorney for this District, his representative herein; and

IT IS FURTHER ORDERED that the said John D. Nagle, Commissioner of Immigration as aforesaid, or whoever, acting under the orders of said Commissioner, or the Secretary of Labor, shall have the custody of said Jung Lin, or the master of any steamer upon which she may have been placed for deportation by said Commissioner, are hereby directed and ordered to retain said Jung Lin within the custody of the said Commissioner of Immigration and within jurisdiction of this court, until its further order herein.

Dated: San Francisco, California, March 21st, 1930.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Mar. 21, 1930. [11]

[Title of Court and Cause.]

APPEARANCE OF RESPONDENT AND NOTICE OF FILING EXCERPTS OF TESTIMONY FROM THE ORIGINAL IMMIGRATION RECORD.

To the Petitioner in the Above-entitled Matter, and to Joseph P. Fallon, Esq., Her Attorney:

PLEASE TAKE NOTICE that the respondent hereby appears in the above-entitled matter and will, upon the hearing on the order to show cause, rely upon certain excerpts of testimony from the original immigration record additional to the portions of such records which are set out in the petition for writ of habeas corpus herein, a copy of such additional excerpts being annexed hereto. Please examine same prior to the hearing on the order to show cause.

Dated: May 26, 1930.

GEORGE J. HATFIELD,
United States Attorney.
(Attorney for Respondent.) [12]

[Title of Court and Cause.]

RESPONDENT'S MEMORANDUM OF EXCERPTS OF TESTIMONY FROM THE ORIGINAL IMMIGRATION RECORD.

The witnesses herein are:

JUNG LIN, the applicant, female, born July 6, 1905, never in the United States.

JUNG JUCK, alleged brother of applicant, born September 8, 1906, first came to the United States during May, 1914, and was back in China from October, 1920, to June, 1921, and from April, 1926, to September, 1927.

JUNG WOH, alleged brother of applicant, born June 22, 1910, first came to the United States June 1, 1915, and was back in China from May, 1925, to May, 1926.

JUNG SHARE, alleged brother of applicant, born November 7, 1913, first came to the United States June 17, 1920, and was back in China from July, 1928, to June, 1929.

JUNG SOM, alleged brother of applicant, born November 2, 1915, first came to the United States December 29, 1927, and has been here since.

Applicant seeks admission as the daughter of one Jung Ock, a citizen of the United States, who is said to have died on September 26, 1926. The immigration authorities have denied her admission for failure to establish her claimed relationship to that person. We quote below, from the original

[13] immigration record, some of the testimony upon which the finding is based.

I.

The following appears in the testimony of JUNG JUCK, given on February 3, 1930:

"Q. What other districts border on the Hoy Ping District?

A. Yin Ping District, Sun Ning District; that's all I know.

Q. Whereabouts in the Hoy Ping District is your home village located with reference to the boundaries of the district?

A. I don't know, but I think my village is located in the Hoy Ping District over 1 po from any of the district boundary lines." (Immig. Record, 55703/405—p. 85.)

"(Chairman to Interpreter.)

Q. In what dialect has this witness testified?

A. In the See Yip, Hoy Ping Dialect, with a word here and there given a pronunciation other than the See Yip, Hoy Ping dialect.

* * * * * * * * *

Interpreter Tang is replaced by Interpreter Lee Park Lin.

Witness recalled: Admonished he is still under oath.

Note: Interpreter instructed to hold conversation with witness.

(Chairman to Witness.)

Q. (Giving Exhibit 'D.') Here are 8 Chi-

nese sentences. Please read them slowly and pronounce carefully. A. Witness does so.

* * * * * * * * *

(Chairman to Interpreter.)

Q. In what dialect has this witness testified?

A. In the See Yip, Hoy Ping dialect.

* * * * * * * * *

Witness recalled: Admonished he is still under oath.

Interpreter: Leong Kow.

Note: Interpreter instructed to hold conversation with witness.

(Chairman to Witness.)

Q. (Showing Exhibit 'D.') Here are 8 Chinese sentences. Please read them slowly and pronounce carefully.

A. Witness does so.

* * * * * * * * *

(Chairman to Interpreter Leong Kow.)

Q. In what dialect has this witness testified?

A. In my opinion, he speaks the See Yip, Hoy Ping dialect, but he tried to mix in some Cantonese dialect." (Id., pp. 86, 87, 88.)

The following appears in the testimony of JUNG WOH, given the same day:

"(Chairman to Interpreter.)

Q. In what dialect has this witness testified?

A. In the See Yip dialect of the Hoy Ping District.

* * * * * * * * *

Lee Park Lin replaces Interpreter Harry Tang.

Witness recalled: Admonished he is still under oath.

Note: Interpreter instructed to hold conversation with witness.

(Chairman to Witness.)

Q. (Showing Exhibit 'D.') Here are 8 Chinese sentences. Please read them slowly and pronounce carefully. A. Witness does so.

* * * * * * * * *

(Chairman to Interpreter.)

Q. In what dialect has this witness testified?

A. See Yip, Hoy Ping." (Id., p. 89.)

"Witness recalled: Admonished he is still under oath.

Interpreter: Leong Kow.

Note: Interpreter instructed to hold conversation with witness.

(Chairman to Witness.)

Q. (Showing Exhibit 'D.') Here are 8 Chinese sentences. Please read them slowly and pronounce carefully. A. Witness does so.

* * * * * * * * *

(Chairman to Interpreter.)

Q. In what dialect has this witness testified?

A. In my opinion, he speaks the See Yip, Hoy Ping dialect." (Id., p. 90.)

The following appears in record of testimony given by JUNG SOM on February 1, 1928:

"Speaks the See Yip dialect of the Hoy Ping District." (Immig. Record 26504/4–19—p. 10.)

The following appears in record of testimony given by JUNG SHARE on June 23d, 1920:

> "Speaks See Yip dialect." (Immig. Record 19217/4–10—p. 12.)

Record of testimony given by JUNG OCK at various times shows the following:

> May 8, 1914: "Speaks the See Yip dialect." (Immig. Record 26188/23–27—p. 9.)
>
> June 23, 1920: "Speaks See Yip dialect." (Immig. Record 19217/4–10—p. 16.)

Testimony of applicant JUNG LIN given on December 19, 1929, contains the following:

> "Applicant answers manifest questions as follows: I am 25 years old, Chinese reckoning; female of the Chinese race; I was born K. S. 31–6–4 (July 6, 1905) in the See Gow Village, Hoy Ping Dist., China, where I have lived all my life until coming to the U. S."
>
> * * * * * * * * *
>
> Note by Interpreter Chas. Jung: This applicant claims to speak the See Yip Dialect of the Hoy [15] Ping District, but after hearing this applicant testify so far in the case, I believe that this applicant is testifying in a dialect other than the one she claims. I believe it is better to have a change of interpreters, so that there may be no misunderstanding." (Immig. Record 55703/405—p. 17.)

Record of the testimony taken on December 21, 1929, shows the following:

"(By Chairman to the Interpreter, Lee Park Lin.)

Q. In what dialect has this applicant testified?

A. She testified part of the time in Cantonese and part of the time in some other dialect and it sounded to be more like a person who is trying to speak the See Yip Dialect, somewhat like the Sun Woey Dialect, but nothing like the Hoy Ping District Dialect, the district claimed by the applicant to have come from." (Id., p. 27.)

Record of the applicant's testimony of December 24, 1929, shows the following:

"Q. Have you ever spoken any other dialect than the one you are speaking now? A. No. (By Chairman to Applicant.)

Q. All the Interpreters who have served you in this case are now present in this room. Will you explain why it is that you speak a dialect utterly different from the See Yip, Hoy Ping Dialect which you should speak if you were born and raised in the district that you claim as home?

A. Well, I have always spoken the same dialect that I am speaking now.

Q. All of these Interpreters are agreed upon the fact that the dialect you are now speaking is not the See Yip, Hoy Ping Dialect. Have you any explanation to offer why you should not be speaking the See Yip, Hoy Ping Dialect?

A. Well, there are many dialects spoken in the Hoy Ping District and I have always spoken the same dialect that I am speaking now.

Q. (To Interpreter C. J. Jung.) Does this applicant, in your estimation, talk in the See Yip, Hoy Ping dialect? A. No.

Q. Did she ever use the See Yip, Hoy Ping dialect while you were acting on this case?

A. No.

Q. (To Interpreter Fung Ming.) Does this applicant, in your estimation, talk in the See Yip, Hoy Ping dialect? A. No.

Q. Did she ever use the See Yip, Hoy Ping dialect while you were acting on this case?

A. She uses a mixed dialect, a little of the Hoy Ping, a little bit of the Sun Ning, a little bit of the Sun Wui, and a little bit of Sam Yup.

Q. (To Interpreter Mrs. D. K. Chang.) Does this applicant, in your estimation talk in the See Yip, Hoy Ping dialect? A. No.

Q. Did she ever use the See Yip, Hoy Ping dialect while you were acting on this case?

A. No. She spoke mainly Sam Yup dialect." (Id., pp. 50, 51.) [16]

"(By Chairman to Interpreter H. K. Tang.)

Q. Have you questioned this applicant in the See Yip dialect of the Hoy Ping District, which she claims to speak? A. I have.

Q. Has the applicant answered you in that dialect? A. No.

Q. In what dialect has this applicant testified?

A. In the Sam Yup dialect. The dialect she speaks sounds like the dialect spoken by people of the Ching Yuen District, a district located about 40 or 50 miles north of Canton City. Her dialect is not the pure Canton City dialect.

Q. Has this applicant used the same dialect thruout her testimony while you acted as Interpreter? A. She has.

Q. Does the applicant's dialect in any way resemble the See Yip dialect?

A. No, there is a pronounced difference." (Id., p. 52.)

Record of applicant JUNG LIN'S testimony, given on February 3, 1930, shows the following:

"(Interpreter: Harry Tang.)

Q. What are all your names?

A. Jung Lin, no others.

Note: Interpreter instructed to hold conversation with applicant.

(Chairman to Interpreter.)

Q. Mr. Tang, how long have you been an interpreter in the Government Service?

A. About 16 years in all.

Q. Have you ever been called upon to pass expert opinion upon the questions of different Chinese dialects? A. Yes.

Q. Have you ever appeared in any court as an expert on dialect questions?

A. I do not recall that I have appeared in court in that capacity.

Q. Have you ever appeared in court as an expert interpreter?

A. Yes, I have, many times.

Q. What experience have you had interpreting south Chinese dialects?

A. I have been in the U. S. Immigration Service for about 16 years, interpreting mostly for Chinese coming here from south China, particularly from those districts about Canton City. The dialects spoken by these people are commonly classified here as Sam Yup, See Yip, Heung Shan, and Hock Gar dialects. I am quite familiar with these dialects from the fact that I have acted as Chinese Interpreter in the Immigration Service and from my coming in contact with them in the different parts of the United States, and also from my many years of residence in south China.

Q. In what dialect has this applicant testified? A. In the Sam Yup dialect.

Q. Did you try to speak to her in the See Yip, Hoy Ping dialect, which she claims to speak? A. I did.

Q. Did she answer you in that dialect?

A. No, she did not, although she appears to understand the Hoy Ping dialect quite readily.

Q. Does the applicant's dialect differ noticeably from the See Yip, Hoy Ping dialect?

A. Yes.

Interpreter Lee Park Lin replaces Harry Tang as interpreter.

Q. Have you understood the previous interpreter? A. Yes. [17]

Note: Interpreter instructed to hold conversation with applicant.

(Chairman to Interpreter.)

Q. Mr. Lee, how long have you been an interpreter in the Government Service?

A. Over twenty-one years.

Q. Have you ever been called upon to pass expert opinion upon the question of different Chinese dialects? A. Yes, occasionally.

Q. Have you ever appeared in any court as an expert interpreter? A. Yes.

Q. What experience have you had with south Chinese dialects?

A. I have interpreted nothing but the Southern Chinese dialects during all the time I have been serving as interpreter in the Immigration Service for over 21 yrs. During that time I have had much opportunity in interpreting for Chinese coming from the See Yip districts and Sam Yup districts and for that reason I am able to tell by listening to their speech, just what part of China they come from.

Q. In what dialect has this applicant spoken to you?

A. She has spoken in a mixed dialect; she is attempting to speak the Hoy Ping District dialect but, in my opinion, she came originally from a place where Cantonese dialect is spoken, because in her answers she spoke more

a Cantonese dialect than she did Hoy Ping District dialect.

Q. Is there a pronounced difference between the applicant's dialect and the See Yip, Hoy Ping dialect?

A. Yes, but as I have stated before, she attempted to speak the Hoy Ping District dialect.

Q. You have heard the applicant's two alleged brothers speak. In your opinion, does the applicant speak the same dialect that was used by her two alleged brothers? A. No.

Interpreter Leong Kow replaces Lee Park Lin as interpreter.

Q. Have you understood the previous interpreter? A. Yes.

Note: Interpreter instructed to hold conversation with applicant.

(Chairman to Interpreter.)

Q. Mr. Leong, how long have you been an interpreter in the Government service?

A. About 7 years.

Q. Have you ever appeared in any court as an interpreter? A. Once.

Q. What experience have you had with south Chinese dialects?

A. In my experience with the Immigration Service I have met many Chinese from a number of different districts in south China and am familiar with most of the dialects spoken in south China.

Q. In what dialect has this applicant spoken to you?

A. In a mixed dialect, composed of Sam Yup and See Yip dialects.

Q. Is there a pronounced difference between the applicant's dialect and the See Yip, Hoy Ping dialect? A. Yes.

Q. You have heard the applicant's two alleged brothers speak. In your opinion, does the applicant speak the same dialect that is used by her two alleged brothers? A. No.

(To applicant.)

Q. Have you understood the interpreter?

A. Yes (through Harry Tang). [18]

Note: Interpreter Harry Tang recalled.

(Chairman to Interpreter Mr. Tang.)

Q. You have heard the applicant's two alleged brothers speak. In your opinion, does the applicant speak the same dialect that is used by her two alleged brothers?

A. No." (Id., pp. 90, 91, 92.)

II.

JUNG LIN testified on December 19, 1929, as follows:

"I was born K. S. 31–6–4 (July 6, 1905)." (Id., p. 17.)

JUNG OCK testified on January 4, 1906, upon his application for admission to the United States as follows:

"Q. When were you married?

A. Last year, 8th month.

* * * * * * * * *

Q. Where is your wife living now?

A. She is living in Say Geu village, my village.

Q. Who is living in the house where she is?

A. She is living there by herself." (Immig. Record 12017/27772—p. 39.)

III.

JUNG JUCK testified on December 18, 1929, as follows:

"Q. Describe your maternal grandparents.

A. Grandfather, Leung Yick Chew, 65 or 66 years old, now living in the Foo Shan village, Hoy Ping District, China; grandmother, Jung Shee, 65 or 66 years old; natural feet; now living in the Foo Shan Village, Hoy Ping District, China." (Immig. Record 55703/405—p. 31.)

JUNG SHARE testified on the same date as follows:

"Q. Describe your maternal grandparents.

A. Grandfather, Leung Yick Chew, age, a little over 60; now residing at Foo Shan Village; my grandmother is, Jeung Shee, age, a little over 60; natural feet, now dead.

Q. When did your maternal grandmother die? A. Several years ago.

Q. How do you know that?

A. Her mother told me.

Q. If that grandmother was dead would not your brother, Jung Juck, know about it? He has said that she is living.

A. In that case I forgot about it.

Q. Well, is she living or dead?

A. She is not living.

Q. How old were you at the time of her death?

A. I do not remember how old I was. When I was young my mother told me." (Id., p. 39.)

JUNG LIN testified on December 19, 1929, as follows:

"Q. What are the names of your mother's parents?

A. Her father's name was Leung Yick Chew; her mother was Jung Shee. Both died before I was born." (Id., p. 19.) [19]

IV.

Summary of the Board of Special Inquiry shows the following:

"It should be noted that the attitude of the applicant thruout the hearing was not good. She maintained a sullen furtive air thruout the hearing and most of her answers were given in a hesitating manner, somewhat like that of a school child trying to answer a previously prepared lesson." (Id., p. 54.)

V.

The following appears in the record of the hearing on February 3, 1930.

"Applicant and her two alleged brothers

brought before the Board for physical comparison.

(By Member HECHT.)

In my opinion, there is no resemblance between the applicant and her two alleged brothers, but there is some resemblance between the two alleged brothers.

(By Member DAVIS.)

I have carefully observed the three persons before this Board and am unable to see a resemblance between the applicant and either of her alleged brothers.

(By Member COLE.)

A comparison of the applicant and her 2 alleged brothers shows a remarkable difference in stature. This feature is remarkable in view of the fact that the three people are quite close to each other in age. The complexion of the oldest alleged brother Jung Juck is quite fair, almost white, while that of the applicant and the other alleged brother are quite sallow and distinctly olive in hue. I could not note any elements of resemblance among these three people that would lead me to believe that a family relationship exists." (Id., p. 93.)

And the following in summary of the Board of Review, dated March 7, 1930.

"From a comparison of the photographs submitted, the Board of Review is of the opinion that while it might reasonably be claimed that the applicant slightly resembles one of her four alleged brothers, namely, Jung Juck, though not

in any degree convincingly to establish a claim of relationship, yet there is no slightest indication of resemblance between her appearance and that of her deceased alleged father or that of either of her other three alleged brothers." (Id., p. 114.)

GEORGE J. HATFIELD,
United States Attorney,
(Attorney for Respondent.)

Service admitted this 14th day of April, 1930.
JOSEPH P. FALLON.
By E. RISSO.

[Endorsed]: Filed May 26, 1930. [20]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 26th day of May, in the year of our Lord one thousand nine hundred and thirty. Present: The Honorable FRANK H. KERRIGAN, Judge.

[Title of Cause.]

MINUTES OF COURT—MAY 26, 1930—ORDER SUBMITTING MATTER.

This matter came on regularly this day for hearing on order to show cause as to the issuance of a writ of habeas corpus. J. P. Fallon, Esq., was present as attorney for petitioner. A. E. Bagshaw,

Esq., Asst. U. S. Atty., was present for respondent. On motion of Mr. Fallon and no objections being made thereto, the Court ordered that the Immigration Records be filed as part of original petition. Said matter was argued by counsel and ordered submitted. [21]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 27th day of May, in the year of our Lord one thousand nine hundred and thirty. Present: The Honorable FRANK H. KERRIGAN, Judge.

[Title of Cause.]

MINUTES OF COURT—MAY 27, 1930—ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS.

IT IS ORDERED that the petition for writ of habeas corpus heretofore submitted herein be and the same is hereby denied, and said petition dismissed accordingly. [22]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the Clerk of the Above-entitled Court, to JOHN D. NAGLE, Commissioner of Immigration, and to GEORGE J. HATFIELD, Esq., United States Attorney, His Attorney:

You, and each of you, will please take notice that Jung Woh, the petitioner in the above-entitled matter, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the order and judgment rendered, made and entered herein on May 27, 1930, denying the petition for a writ of habeas corpus filed herein.

Dated this 2d day of June, 1930.

JOSEPH P. FALLON,
Attorney for Petitioner. [23]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Comes now Jung Woh, the petitioner in the above-entitled matter, through his attorney, Joseph P. Fallon, Esq., and respectfully shows:

That on the 27th day of May, 1930, the above-entitled court made and entered its order denying the petition for a writ of habeas corpus, as prayed for, on file herein, in which said order in the above-entitled cause certain errors were made to the prejudice of the appellant herein, all of which will

more fully appear from the assignment of errors filed herewith.

WHEREFORE, the appellant prays that an appeal may be granted in her behalf to the Circuit Court of Appeals of the United States for the Ninth Circuit thereof, for the correction of the errors as complained of, and further, that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit thereof, and further, that the said appellant be held within the jurisdiction of this court during the pendency of the appeal herein, so that she may be produced in execution of whatever judgment may be finally entered herein.

Dated at San Francisco, California, June 2d, 1930.

JOSEPH P. FALLON,
Attorney for Petitioner. [24]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the appellant, Jung Lin, through her attorney, Joseph P. Fallon, Esq., and sets forth the errors she claims the above-entitled court committed in denying her petition for a writ of habeas corpus, as follows:

I.

That the court erred in not granting the writ of

habeas corpus and discharging the appellant, Jung Lin, from the custody and control of John D. Nagle, Commissioner of Immigration at the port of San Francisco.

II.

That the court erred in not holding that it had jurisdiction to issue the writ of habeas corpus as prayed for in the petition on file herein.

III.

That the court erred in not holding that the allegations set forth in the petition for a writ of habeas corpus were sufficient in law to justify the granting and issuing of a writ of habeas corpus.

IV.

That the court erred in holding that the claimed discrepancies in the testimony, as a result of the evidence adduced before the immigration authorities, were sufficient, in law, to justify the [25] conclusion of the immigration authorities that the claimed relationship between the alleged father of appellant and appellant did not exist.

V.

That the court erred in not holding that the claimed discrepancies in the testimony as a result of the evidence adduced before the immigration authorities, were not sufficient in law, to justify the conclusion of the immigration authorities that the claimed relationship between the alleged father of appellant and appellant did not exist.

VI.

That the court erred in holding that the claimed discrepancies, or any of them, in the testimony, as a result of the evidence adduced before the immigration authorities, were not subject to a reasonable explanation and reconcilable.

VII.

That the court erred in not holding that any and all of the claimed discrepancies in the testimony, as a result of the evidence adduced before the immigration authorities, were subject to a reasonable explanation and reconcilable.

VIII.

That the court erred in holding that the evidence adduced before the immigration authorities was not sufficient, in kind and character, to warrant a finding by the immigration authorities that the claimed relationship between the alleged father of appellant and appellant existed.

IX.

That the court erred in not holding that the evidence adduced before the immigration authorities was sufficient, in kind and character, to warrant a finding by the immigration authorities that the claimed relationship between the alleged father of appellant and appellant existed. [26]

X.

The court erred in holding that there was substantial evidence before the immigration authori-

ties to justify the conclusion that the claimed relationship between the alleged father of the appellant and the appellant did not exist.

XI.

That the court erred in not holding that there was no substantial evidence before the immigration authorities to justify the conclusion that the claimed relationship between the alleged father of the appellant and the appellant did not exist.

XII.

That the court erred in holding that the appellant was accorded a full and fair hearing before the immigration authorities.

XIII.

That the court erred in not holding that the appellant was not accorded a full and fair hearing before the immigration authorities.

WHEREFORE, appellant prays that the said order and judgment of the United States District Court for the Northern District of California made, given and entered herein in the office of the Clerk of said court on the 27th day of May, 1930, denying the petition for a writ of habeas corpus be reversed and that she be restored to her liberty and go hence without day.

JOSEPH P. FALLON,
Attorney for Appellant.

Service and receipt of a copy of the within notice of appeal, petition, and assignment of errors is hereby admitted this 3 day of June, 1930.

GEO. J. HATFIELD,
Attorney for ————.

[Endorsed]: Filed Jun. 3, 1930. [27]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

It appeared to the above-entitled court that Jung Woh, the petitioner herein, has this day filed and presented to the above court his petition praying for an order of this court allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and order of this court denying a writ of habeas corpus herein and dismissing his petition for said writ, and good cause appearing therefor,—

IT IS HEREBY ORDERED that an appeal be and the same is hereby allowed as prayed for herein; and

IT IS HEREBY FURTHER ORDERED that the Clerk of the above-entitled court make and perpare a transcript of all the papers, proceedings and records in the above-entitled matter and transmit the same to the United States Circuit Court of Appeals for the Ninth Circuit within the time allowed by law; and

IT IS FURTHER ORDERED that the execution of the warrant of deportation of said Jung Lin be and the same is hereby stayed pending this appeal, and that the said Jung Lin be not removed from the jurisdiction of this court pending this appeal.

Dated at San Francisco, California, June 3d, 1930.

FRANK H. KERRIGAN,
United States District Judge.

Service and receipt of a copy of the within order allowing appeal is hereby admitted this 3 day of June, 1930.

GEO. J. HATFIELD,
Attorney for ————.

[Endorsed]: Filed Jun. 3, 1930. [28]

[Title of Court and Cause.]

ORDER TRANSMITTING ORIGINAL EXHIBITS.

It appearing to the court that the original immigration records appertaining to the application of Jung Lin, the detained herein, to enter the United States, were introduced in evidence before and considered by the lower court in reaching its determination herein, and it appearing that said records are a necessary and proper exhibit for the determination of said case upon appeal to the Circuit Court of Appeals,—

IT IS NOW THEREFORE ORDERED, upon motion of Joseph P. Fallon, Esq., attorney for the detained herein, that the said immigration records may be withdrawn from the office of the Clerk of this court, and filed by the Clerk of this court in the office of the Clerk of the United States Circuit Court of Appeals in and for the Ninth Judicial District, said withdrawal to be made at the time the record on appeal is certified to by the Clerk of this court.

Dated at San Francisco, California, June 3d, 1930.

FRANK H. KERRIGAN,
United States District Judge.

Service and receipt of a copy of the within order transmitting original exhibits is hereby admitted this 3 day of June, 1930.

GEO. J. HATFIELD,
Attorney for ————.

[Endorsed]: Filed Jun. 3, 1930. [29]

[Title of Court.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 29 pages, numbered from 1 to 29 inclusive, contain a full, true, and correct transcript of the records and proceedings in the Matter of Jung Lin, on Habeas

Corpus, No. 20,233—K, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of fourteen dollars and thirty-five cents ($14.35), and that the said amount has been paid to me by the attorney for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 24th day of June, A. D. 1930.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [30]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to JOHN D. NAGLE, Commissioner of Immigration, Port of San Francisco, and GEORGE J. HATFIELD, United States Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein Jung Lin

is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Southern Division of the Northern District of California, this 3d day of June, A. D. 1930.

FRANK H. KERRIGAN,
United States District Judge.

Service and receipt of a copy of the within citation on appeal is hereby admitted this 3 day of June, 1930.

GEO. J. HATFIELD,
Attorney for ————.

[Endorsed]: Filed Jun. 3, 1930. [31]

[Endorsed]: No. 6174. United States Circuit Court of Appeals for the Ninth Circuit. Jung Lin, Appellant, vs. John D. Nagle, as Commissioner of Immigration for the Port of San Francisco, California, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed June 24, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6175

United States

Circuit Court of Appeals

For the Ninth Circuit.

AMANDO DIDENTI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filmer Bros. Co Print, 330 Jackson St., S. F., Cal.

No. 6175

United States
Circuit Court of Appeals
For the Ninth Circuit.

AMANDO DIDENTI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filmer Bros. Co Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

PAGE, T. D., 521 McDowall Bldg., Seattle, Washington,

Attorney for Appellant.

SAVAGE, ANTHONY, U. S. District Attorney for the Western District of Washington, Seattle, Washington,

McCUTCHEON, JOHN T., Assistant U. S. District Attorney for the Western District of Washington, Tacoma, Washington,

MALLERY, JOSEPH A., Assistant U. S. District Attorney for the Western District of Washington, Tacoma, Washington,

Attorneys for Appellee. [1*]

(Wash. 9543)

United States District Court, Western District of Washington, Southern Division.

July, 1929, Term.

No. 14,134.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALBERT DIDENTI, JOHN HUGGLER, and JACK ESARA,

Defendants.

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*Page-number appearing at the foot of page of original certified Transcript of Record.

INDICTMENT.

Vio. Sec. 37 Penal Code, Conspiracy to Violate the Act of Oct. 28, 1919, Known as the National Prohibition Act, and Vio. Secs. 3281 and 3282 R. S.

United States of America,
Western District of Washington,
Southern Division,—ss.

The grand jurors of the United States of America, being duly selected, impaneled, sworn and charged to inquire within and for the Southern Division of the Western District of Washington, upon their oaths present: [2]

COUNT I.

That ALBERT DIDENTI, JOHN HUGGLER, and JACK ESARA, on or about the first day of June, in the year of our Lord one thousand nine hundred and twenty-nine, within the Southern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, willfully, unlawfully, and feloniously combine, conspire, confederate and agree together, and with each other, and together with sundry and divers other persons to the grand jurors unknown, to commit certain offenses against the United States, that is to say, to manufacture, possess, transport, and sell intoxicating liquor unlawfully and illegally for beverage purposes, to wit, whiskey, then

and there containing more than one-half of one per centum of alcohol by volume, being then and there fit for use for beverage purposes, in violation of Sections 3 and 6 of Title II of the provisions of the Act of Congress passed October 28, 1919, and known as the National Prohibition Act, all of which was done with the willful, unlawful, and felonious intent of violating the aforesaid provisions of the aforesaid Act. That said conspiracy was and is a continuing conspiracy, continuing from the first day of June, 1929, to the time of the presentment of this indictment.

OVERT ACTS.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of the aforesaid conspiracy, and for the purpose of executing said unlawful conspiracy and agreement, the hereinafter mentioned parties, [3] within the Southern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did certain overt acts, that is to say:

1. That on or about the 1st day of August, 1929, said ALBERT DIDENTI, JOHN HUGGLER, and JACK ESARA, in said division and district, did ferment, approximately, two thousand five hundred (2,500) gallons of mash fit for distillation purposes, at those certain premises known as the ranch of the said John Huggler, located on East 64th Street, near Tacoma, Washington.

2. That on or about the 2d day of August, 1929, said ALBERT DIDENTI, in said division and district, did transport, approximately, four hundred (400) pounds of Cel*u*lose sugar and four hundred (400) pounds of Argo corn sugar, on the said ranch of the said John Huggler, located on East 64th Street, near Tacoma, Washington.

3. That on or about the 2d day of August, 1929, said ALBERT DIDENTI, JOHN HUGGLER, and JACK ESARA, in said division and district, did possess, approximately, seventy-three (73) gallons of whiskey at the said ranch of the said John Huggler, located on East 64th Street, near Tacoma, Washington.

4. That on or about the 2d day of August, 1929, said ALBERT DIDENTI, JOHN HUGGLER, and JACK ESARA, in said division and district, did have in their possession one (1) 350-gallon still at the said ranch of the said John Huggler, located on East 64th Street, near Tacoma, Washington. [4]

5. That said ALBERT DIDENTI, JOHN HUGGLER, and JACK ESARA, on or about the 2d day of August, 1929, in said division and district, did manufacture, approximately, seventy-three (73) gallons of whiskey at the said ranch of the said John Huggler, located on East 64th Street, near Tacoma, Washington.

6. That said ALBERT DIDENTI, JOHN HUGGLER, and JACK ESARA, on or about the 2d day of August, 1929, in said division and district, did have in their possession five (5) five hundred

gallon vats, two (2) pressure tanks, and two (2) burners at the said ranch of the said John Huggler, located on East 64th Street, near Tacoma, Washington.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [5]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT II.

That ALBERT DIDENTI, JOHN HUGGLER, and JACK ESARA, on or about the second day of August, in the year of our Lord one thousand nine hundred and twenty-nine, near Tacoma, Washington, and at those certain premises known as the ranch of the said John Huggler, located on East 64th Street, near said Tacoma, Washington, in the Southern Division of the Western District of Washington, within the jurisdiction of this court, and within the Internal Revenue Collection District of Washington, then and there being, did then and there knowingly, willfully, unlawfully, and feloniously carry on the business of a distiller of spirits, without having given bond as required by law; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [6]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT III.

That ALBERT DIDENTI, JOHN HUGGLER,

and JACK ESARA, on or about the second day of August, in the year of our Lord one thousand nine hundred and twenty-nine, near Tacoma, Washington, and at those certain premises known as the ranch of the said John Huggler, located on East 64th Street, near said Tacoma, Washington, in the Southern Division of the Western District of Washington, within the jurisdiction of this court, and within the Internal Revenue Collection District of Washington, then and there being, did then and there knowingly, willfully, unlawfully, and feloniously make and ferment, approximately, two thousand five hundred (2,500) gallons of a certain mash, wort, or wash, fit for distillation of spirits, in a certain building, to wit, that certain chicken-house or outbuilding situated on said premises, not then and there a distillery duly authorized according to law; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

ANTHONY SAVAGE,
United States Attorney.
JOHN T. McCUTCHEON,
Assistant United States Attorney. [7]

[Indorsed]: A true bill.

E. J. CRARY,
Foreman Grand Jury.

[Indorsed]: Presented to the Court by the Foreman of the Grand Jury in open court in the pres-

ence of the Grand Jury, and filed in the U. S. District Court. Oct. 17, 1929. Ed M. Lakin, Clerk. [8]

VERDICT.

We, the jury empanelled in the above-entitled cause, find the defendant Amando Didenti is guilty as charged in Count I of the indictment filed herein; and further find the defendant Amando Didenti not guilty as charged in Count II of the indictment filed herein; and further find the defendant Amando Didenti not guilty as charged in Count III of the indictment filed herein; and further find the defendant John Huggler not guilty as charged in Count I of the indictment filed herein; and further find the defendant John Huggler not guilty as charged in Count II of the indictment filed herein; and further find the defendant John Huggler not guilty as charged in Count III of the indictment filed herein; and further find the defendant Jack Esara not guilty as charged in Count I of the indictment filed herein; and further find the defendant Jack Esara not guilty as charged in Count II of the indictment filed herein; and further find the defendant Jack Esara not guilty as charged in Count III of the indictment filed herein.

L. A. DRINKWINE,
Foreman.

[Indorsed]: Filed Nov. 15, 1929. [9]

COPY OF RECORD FROM JUDGMENT AND DECREE JOURNAL.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division of said District on the 23d day of December, 1929, the Honorable EDWARD E. CUSHMAN, United States District Judge presiding, among other proceedings had, were the following, truly taken and correctly copied from the Judgment and Decree Journal of said court as follows:

No. 14,134.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AMANDO DIDENTI,

Defendant.

JUDGMENT AND SENTENCE.

On this 23d day of December, 1929, defendant comes into court in his own proper person for sentence and being informed of the charges against him in this cause and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him at this time, he nothing says save as before he hath said. Wherefore, by reason of the law and the premises, it is by the Court ordered, adjudged and decreed that defend-

ant is guilty of violating Section 37, Penal Code (Conspiracy to Violate National Prohibition Act), and that he be punished by being imprisoned in the Pierce County Jail, or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States for the period of Eight Months on Count I of the indictment, and on December 27, 1929, the U. S. Marshal is to take defendant into his custody and carry this sentence into execution. [10]

COPY OF RECORD FROM COURT JOURNAL.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division of said District on the 25th day of November, A. D. 1929, the Honorable EDWARD E. CUSHMAN, United States District Judge presiding, among other proceedings had, were the following, truly taken and correctly copied from the Journal Record of said court, as follows:

No. 14,134.

UNITED STATES OF AMERICA

vs.

AMANDO DIDENTI,

Defendant.

HEARING ON MOTION IN ARREST OF JUDGMENT AND ON MOTION FOR NEW TRIAL.

On this 25th day of November, this cause comes on for hearing of defendant's motion in arrest of judgment and motion for new trial, argued by Asst. U. S. Attorney Mallery and T. D. Page. The motions are denied and exceptions allowed. [11]

No. 14,134.

AMENDED BILL OF EXCEPTIONS.

BE IT REMEMBERED, that on the 15th day of December, 1929, in the afternoon thereof, the above-entitled cause came on regularly for trial in the above-entitled court before the Honorable Judge, EDWARD E. CUSHMAN; and the plaintiff appearing by Anthony Savage, United States Attorney, and through his deputy, Joseph Mallery; and defendants John Huggler and Jack Esaro, being defended by Attorney Lloyd, and Amando Didenti, appearing in person and being defended by his attorney, T. D. Page.

Thereafter the jury was regularly empanelled and sworn to try said cause, and the parties having made their opening statements, the following named witnesses on behalf of plaintiff were called by the Government: G. A. Gralton, H. W. Raney, Harold Bird, and C. H. Griffith.

TESTIMONY OF H. W. RANEY, FOR THE GOVERNMENT.

H. W. RANEY testified as follows, to wit:

Stating that he was a legal deputized United States prohibition officer, and that on the 2d day of August, 1929, at about 10 P. M., he and Agents Gralton and Bird went to the place of John Huggler on East 64th Street, Tacoma, with a federal search-warrant. They went into the chicken-house at the rear of the place. The odor of fermenting mash could be detected at a distance, and upon examination the officers found the still not in operation. While the agents were watching the still-house the dogs at the residence began to bark and the agents could soon hear men talking. Jack Esaro and John Huggler entered the still-house and were there for about ten minute*d* and then started out the door. At this time they were placed under arrest by Agents Bird and Gralton. Agent Raney then waited in the front yard until about 11:15 P. M., when a Chrysler sedan drove in and on past the house to the chicken-house or still-house. It stopped and the lights were turned out. Amando Didenti was arrested as the driver of this car, which contained 400 lbs. *cero*lose sugar, 400 lbs. Argo corn sugar, 3 10-gallon kegs, and 50 lbs. of yeast. Amando Didenti stated that the Chrysler "65" sedan belonged to the [12] Baker U–Drive Company, and was rented from them at about 9:30 or 10:00 that night. He also stated that he had

(Testimony of H. W. Raney.)
rented a car from them once before. Agents Gralton and Bird testified to substantially the same facts as Agent Raney. They testified they didn't know about the connection of Guarrazino Guarrazi with this still until after the indictment in this case was returned.

TESTIMONY OF G. H. GRIFFITH, FOR THE GOVERNMENT.

G. H. GRIFFITH was called by the Government and testified as follows: That he was a deputy qualified prohibition officer for the United States Government, and that on or about the 2d day of August he saw the defendant Amando Didenti on the streets of Tacoma, in the evening of the day that he was arrested, the same being the 2d day of August, 1929, about the hour of 8 o'clock; that he accosted him and talked with him, and knew that he had the sugar and articles in his car, that he had in his possession when he was arrested at the place where the still was found at 64th Street, near Tacoma, Washington, and that said defendant there afterwards *al*luded him from following the said defendant; that he afterwards saw him driving that same evening in another car other than the one he saw him with earlier in the evening.

Whereupon the defendant, Amando Didenti, through his attorney, T. D. Page, moved for a dismissal of said cause, and the discharge of said jury, upon the *f*round of the insufficiency of the

(Testimony of Amando Didenti.)

evidence to convict the defendant; said motion was overruled and objection allowed.

Whereupon the defendant, Amando Didenti, took an exception thereto, the exception being allowed.

TESTIMONY OF AMANDO DIDENTI, IN HIS OWN BEHALF.

Whereupon the defendant, AMANDO DIDENTI, took the witness-stand in his own defense, and testified to the following facts: That he had been working as an extra helper for Mr. Lidsey, the proprietor and operator of that certain grocery store located at Tacoma, Pierce [13] County, Washington, and received therefor for said services as a delivery agent for the proprietor of said store and its customers a commission on deliveries purchased from said store; that on the 2d day of August, 1929, one Joe Pinsitti purchased of and from the said proprietor of said store a certain number of barrels, sugar and yeast, that was later delivered by him, Amando Didenti, at the request of the purchaser, Joe Pinsetto, the said purchaser telling him to first take one Jack Esaro to that certain place about a block from where he was that same evening arrested; that he never had talked with or knew Jack Esaro until that day; that he had no interest in his employment nor knew what his business was; that later that evening the said Joe Pinsetto called upon him at the store where he was working and gave him the address for the first

(Testimony of Amando Didenti.)
time, where to deliver these said articles, the place being described as located on 64th Street near the city of Tacoma, Washington, and paid him in advance therefor, the sum of $7.50; that after he was through with his work at about 8 o'clock he went and had his dinner across the street, had a shave, and having finished the day's work he proceeded to the delivery of the articles mentioned as were found in the car when he was arrested; that at the time of arrest he disclaimed any connection with the operation of said still, or that he knew who *operating* the same at any time and denied that he had ever met or conversed with Harold Bird or G. H. Griffith earlier in the day, and upon cross-examination he admitted that two or three years previous he had pleaded guilty and paid a fine of one hundred dollars, for having in his possession a gallon jug of alcohol.

TESTIMONY OF JACK ESARO AND JOHN HUGGLER, FOR DEFENDANT.

Whereupon JACK ESARO and JOHN HUGGLER took the stand in their own defense and testified that neither of them knew the said defendant or ever had any connection with him, and that he never had had [14] anything to do with the operation of the said still. And Jack Esaro, testified as follows: In the early spring of this year I was taken sick and was confined in the Eatonville hospital. After leaving the hospital I was unable

(Testimony of Jack Esaro and John Huggler.)

to do any hard work and came to Tacoma to rest up and get my strength back. On or about July 29th, 1929, Guarrazi made a proposition to me to work for him operating a still. He did not take me to the still. He was to pay me $150.00 a month, and in case I was arrested $50.00 per month while I was in jail. On August 2d, 1929, Amando Didenti came to my house at 3801 North Adams Street, and took me in his car near the Huggler Ranch on East 64th Street, Tacoma, Washington, where the still was located. My instructions from Guarrazino Guarrazi were to clean up the still-house and wait for him. I was waiting for him, G. Guarrazi to come, when the officers placed Huggler and myself under arrest. They arrested Amando Didenti, when he drove into the place. I was weak from my recent illness, out of work, and had no money. I had tried to get any kind of work that I was able to do, but had been unsuccessful, and as $150.00 per month was more money than I had ever made before, it looked big to me; and because Guarrazino Guarrazi had told me there was no danger I took the chance.

Whereupon, at the close of the case and after the Court had given its instructions, the jury retired to deliberate upon their verdict, and on the 16th day of December, 1929, the jury returned into court with a verdict of not guilty of both counts of indictment upon which both Jack Esaro and John Huggler were tried, and found defendant, Amando Didenti, guilty of Count One thereof, and

not guilty as to Count Two of said indictment, which was by the Court received and placed on file.

Whereupon, the defendant, Amdando Didenti, *filed for a* new [15] trial and an arrest of judgment, said motions coming on regularly to be heard on the 23d day of December, 1929; the Court after hearing said motions denied both of them, and an exception was taken by the defendant, said motion being overruled, and an exception allowed thereto.

Whereupon, the Court sentenced defendant as follows: That the defendant be sentenced to eight months on Count One of said conviction in the Pierce County Jail, Tacoma, Washington, and pay the costs connected with said cause.

Whereupon, the Court fixed the amount of the bail and supersedeas bonds for the defendant upon appeal, in the sum of two thousand dollars thereafter, and on the 27th day of December, 1929, the defendant seasonable gave notice of appeal by serving and filing in proper form, his notice of appeal.

T. D. PAGE,
Attorney for Defendant.

Joseph A. Mallery, Asst. U. S. Atty., appearing on the 15th day of Feb. 1930, and stating the preceding pages and this page contain a true statement of the evidence, and defendant's attorney not appearing, the foregoing is settled as a bill of exceptions.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed Feb. 15, 1930. [16]

NOTICE OF APPEAL.

To the Judge and Clerk of the Above-entitled Court, and to ANTHONY SAVAGE, United States District Attorney.

You will hereby take notice that the above-named defendant, Albert Didenti, hereby appeals to United States Circuit Court of Appeals for the 9th Judicial Circuit from the order and judgment entered in the above-entitled cause on the 23d day of December, 1929, and that the certified transcript of the record will be filed in the Circuit Court of Appeals within 30 days from the filing of this notice.

Dated at Tacoma, Washington, this 27th day of December, 1929.

T. D. PAGE,
Attorney for Appellant.
521 McDowall Bldg.,
Seattle, Washington,
Elliott 5052.

Copy received this 27 day of Dec., 1929.
JOSEPH A. MALLERY.

[Indorsed]: Filed Dec. 27, 1929. [17]

CITATION.

United States of America,—ss.

President of the United States of America to the United States of America and ANTHONY SAVAGE, United States Attorney, for the Western District of Washington, Southern Division.

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the 9th Circuit Court, in the city of San Francisco, State of California, within 30 days from date hereof, *persuain* to an appeal allowed by the District Court of the United States for the Western District of Washington, Southern Division, wherein Amando Didenti is appellant and the United States of America is appellee, to show cause, if any you may have, why the judgment rendered against said appellant as in said appeal mentioned should not be corrected and why speedy justice should not be done to the party in that behalf.

WITNESS, the Honorable EDWARD E. CUSHMAN, Judge of the District Court of the United States of America in and for the Western District of Washington, Southern Division, this 9th day of April, 1930.

EDWARD E. CUSHMAN,
District Judge.

Attest: ED M. LAKIN,
Clerk.

By S. E. Leitch,
Deputy. [18]

COURT ORDER ALLOWING APPEAL.

Upon motion, the defendant having filed assignment of errors,—

IT IS ORDERED that the appeal as prayed for be and the same is hereby allowed, the appeal to operate as a supersedeas. The bail bond on appeal is hereby affixed in the sum of Twenty Hundred ($2000) Dollars.

Dated at Tacoma, Washington, this 27th day of December, 1929.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed Dec. 27, 1929. [19]

ASSIGNMENT OF ERRORS.

Comes now the above-named appellant, Albert DeDenti, by his attorney, T. D. Page, and says: That in the record and proceedings in the above-entitled cause there is manifest error in this to wit:

I.

The lower Court erred in failing to direct a verdict of acquittal for the defendant Albert DiDenti, upon the ground that there was not sufficient evidence of guilt to *go the* jury, said motion being taken by defendant at the close of the Government's case against defendant, said motion being overruled and exception taken thereto.

II.

The said motion was interposed by the defendant at the close *at the close* of defendant's introduction of testimony, the same was overruled by the Court and exception taken thereto.

III.

The lower Court erred in entering judgment and sentence of the defendant, Albert DiDenti.

IV.

The lower Court *erred denying* defendant's motion for new trial heretofore interposed.

V.

That the lower Court erred in denying motion in arrest of judgment heretofore interposed by the defendant.

WHEREFORE, the said Albert DiDenti prays that the order and judgment of the aforesaid be reversed and that the said Court be directed to dismiss the charges against said defendant, and release the defendant from further custody, or grant defendant, Albert DiDenti, a new trial.

T. D. PAGE,
Attorney for Appellant,
521 McDowall Bldg.,
Seattle, Washington. [20]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Ed M. Lakin, Clerk. By E. Redmayne, Deputy. [21]

APPEAL BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, Amando Didenti, as principal, and Albert Innocenti and Adelina Innocenti, husband and wife, and Nelson Didenti and Polly Didenti, husband and wife, as sureties, do jointly and severally acknowledge themselves to be indebted to the United States of America in the sum of Two Thousand Dollars ($2,000.00), lawful money of the United States, to be levied on our goods and chattels, lands and tenements, upon the following conditions:

The condition of this obligation is such that whereas the above-named defendant, Amando Didenti, was on the 23d day of December, 1929, sentenced in the above-entitled court to be imprisoned in the Pierce County Jail for a period of eight months, having been convicted on Count I for violation of Section 37, Penal Code (conspiracy to violate the National Prohibition Act);

AND WHEREAS said defendant has sued out a notice of appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit to review said judgment;

AND WHEREAS the above-entitled court has fixed the defendant's bond to stay execution of said judgment, in the sum of Two Thousand Dollars ($2,000.00),—

NOW, THEREFORE, if the said defendant, Amando Didenti, shall diligently prosecute said appeal and shall render himself amenable to all orders

which said Circuit Court of Appeals shall [22] make or order to be made in the premises, and to all process issued or ordered to be issued by said Circuit Court of Appeals and shall not leave the jurisdiction of this court without permission being first granted and shall render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Southern Division, then this obligation shall be void; otherwise to remain in full force and effect.

AMANDO DIDENTI,
Principal.
NELSO DIDENTI,
POLLY X DIDENTI,
T. D. PAGE,
Witness.
ALBERT INNOCENTI,
ADELINA INNOCENTI,
Sureties.

Dated at Tacoma, Washington, this 27th day of December, 1929.

Approved.

EDWARD E. CUSHMAN,
Judge. [23]

United States of America,
Western District of Washington,
Southern Division,—ss.

Albert Innocenti and Adelina Innocenti, husband and wife, sureties on the annexed recognizance, be-

ing duly sworn, depose and say that they reside in Tacoma, Washington, in said District, that they are freeholders in the Western District of Washington; and that they are worth the sum of $2,000.00, over and above all their just debts and liabilities in property subject to execution and sale, and that their property consists of a house and lot located at 2120 North Union Avenue, in Tacoma, Washington, of the reasonable value of $7,000.00, clear of all encumbrances.

ALBERT INNOCENTI.

Subscribed and sworn to before me this 27th day of December, 1929.

[Seal] WESLEY LLOYD,
Notary Public, Tacoma, Wash.

United States of America,
Western District of Washington,
Southern Division,—ss.

Nelso Didenti and Polly Didenti, husband and wife, sureties on the annexed recognizance, being duly sworn, depose and say that they reside in Tacoma, Washington, in said District, that they are freeholders in the Western District of Washington and that they are worth the sum of $2,000.00, over and above all their just debts and liabilities in property subject to execution and sale, and that their property consists of a house and lot located at 4856

Sixth Avenue in Tacoma, Washington, of the reasonable value of $6,000.00, clear of all encumbrances.

NELSO DIDENTI.
POLLY X DIDENTI.
T. D. PAGE,
Witness.

Subscribed and sworn to before me this 27th day of December, 1929.

[Seal] WESLEY LLOYD,
Notary Public, Tacoma, Wash.

[Indorsed]: Filed Jan. 2, 1930. [24]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

Please make up transcript of the record and certificate to the Circuit Court of Appeals, 9th Judicial Circuit, the following papers and records in the above-entitled cause:

1. Information.
2. Verdict of the jury.
3. Judgment and sentence of the Court.
4. All journal entries or orders made by the Court denying each and all motions made by defendant.
5. Notice of appeal, together with citation and order allowing appeal.
6. Order for supersedeas and cost bond.
7. Assignment of errors.
8. Bill of exception, together with judges certificate.

9. Supersedeas bond.
10. Praecipe for transcript of the record.
11. *Clerk* certificate of the record.

T. D. PAGE,
Attorney for Appellant,
521 McDowall Bldg.,
Seattle, Washington.

[Indorsed]: Filed Mar. 14, 1930. [25]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed M. Lakin, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that the foregoing pages numbered from one to twenty-six, inclusive, are a full, true and correct copy of so much of the record and proceedings in the case of the United States of America, Plaintiff, versus Amando Didenti et al., Defendants, in Cause No. 14,134 in said District Court, as is required by praecipe of counsel for appellant Amando Didenti filed and shown herein, and as the originals thereof appear on file and of record in my office at Tacoma, in said District.

I further certify that I hereto attach and transmit the original citation in said cause.

I further certify that the following is a full, true and correct statement of all expenses, fees and

charges incurred in my office on behalf of the appellant herein for making the record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's Fees (Act Feb. 11, 1925) for making record, certificate and return, 49 folios @ 15¢ ea. 7.35
Appeal 5.00
Seal 50

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Tacoma, Washington, this 14th day of April, A. D. 1930.

[Seal] ED M. LAKIN,
Clerk.
By Alice Huggins,
Deputy Clerk. [26]

[Endorsed]: No. 6175. United States Circuit Court of Appeals for the Ninth Circuit. Amando Didenti, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed June 25, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

6175

NO. 6125

United States Circuit Court of Appeals

For the Ninth Circuit

AMANDO DIDENTI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLANT

T. D. PAGE,
Attorney for Appellant,
1002 American Bank Bldg.,
Seattle, Washington.

United States Circuit Court of Appeals

For the Ninth Circuit

AMANDO DIDENTI,
Appellant,

vs.

UNITED STATES OF AMERICA
Appellee

NO. 6125

STATEMENT OF CASE

The appellant and two others John Huggler and Jack Esara were charged by indictment with conspiring together and "with sundry and divers other persons to the grand jurors unknown", to violate the National Prohibition Act. The overt acts alleged were *all* ascribed to the three *named* and *known* defendants. (Tr. pp. 2-4). After a trial the jury acquitted Huggler and Esaro but convicted the appellant as a *lone conspirator* and he was sentenced to a term of eight months in the Pierce County Jail. (Tr. pp. 7 & 8). After the verdict was rendered acquitting his co-defendants, the appellant interposed a motion in arrest of judgment on the ground that he could

not alone be guilty of conspiracy. This motion was denied and an exception allowed and entered. (Tr. p. 10). On the trial it was shown by the government that three prohibition agents discovered a still on Huggler's premises, situated on the outskirts of the city of Tacoma, Washington, and Huggler and Esara in charge and that about an hour later, after night-fall, the appellant drove onto the premises with an automobile loaded with sugar, yeast and empty kegs (Tr. pp. 11 & 12). Thereupon the government rested and the appellant moved for a directed verdict of acquittal on the ground that the evidence failed to show any acquaintance between him and his co-defendants, or that he had any connection with the illicit distillery *or even knew that one existed on Huggler's premises.* This motion was denied and an exception allowed and entered. (Tr. pp. 12 & 13). In his own behalf the appellant testified that he was a delivery boy for a Mr. Lidsey, a grocer in Tacoma; that on the day in question, one Joe Pinsitti not connected by the evidence with the conspiracy purchased the sugar, yeast and kegs at the grocery and directed him to deliver them at a certain address which subsequently proved to be the home of Huggler and that he did not know until after his arrest that there was a still there and had no connection therewith. (Tr.

pp. 13 & 14). Huggler and Esara testified that the still belonyed to a man named Guarrazi and they were employed by him to operate it, the latter having been working only a few hours when arrested. (Tr. pp. 14 & 15). Thereupon the evidence was concluded and the appellant renewed his motion for a directed verdict of acquittal which was denied and exception allowed (Tr. p 20). After the verdict was rendered by the jury, the appellant moved for a new trial and in arrest of judgment. Both motions were denied and exceptions allowed and entered (Tr. p. 16).

ASSIGNMENT OF ERRORS

I.

The lower court erred in refusing to direct a verdict of acquittal in favor of the appellant.

II.

The lower court erred in refusing to grant the appellant's motion for a new trial.

III.

The lower court erred in denying appellant's motion in arrest of judgment interposed after the jury had acquitted all of his co-conspirators.

IV.

The lower court erred in sentencing the appellant to serve a term of eight months in the county jail of Pierce County, Washington.

ARGUMENT

I.

The gist of conspiracy is the unlawful agreement and before one can become a party thereto he must have knowledge of its existence. All of these essentials are absent in the present case, so far as the appellant is concerned. He did not know of the existence of the conspiracy, if there ever was one between his co-defendants and unknown persons; he did not know that there was a still on Huggler's premises when he delivered the sugar, yeast and kegs to that address; he was not shown to have been acquainted with Huggler or Huggler's alleged employer prior to his arrest.

"It is a pre-requisite that the accessory or accomplice shall know the guilty purpose, and with such knowledge, shall, in some way have assisted in its being carried out, or in attempt to carry it out." *Vassaro v. U. S.,* 38 F. 2nd. 862.

The case of *Pattis v. U. S.* 17 F. 2nd. 562, decided by this Court is not opposed to our contention, for in that case, there was evidence that the appellant actually knew that his co-defendant was operating a still and intended to use the supplies

furnished by him to continue the illicit operation. There was an entire absence of such evidence in the present case, and consequently the motion for a directed verdict of acquittal should have been granted.

II

The indictment charged the appellant, Huggler and Esara with conspiring to violate the Nation Prohition Act and all the overt acts set forth in the indictment are alleged to have been committed by them, and by them only. True, the indictment contains the usual "stock" allegation that they conspired with each other, "and with sundry and divers other persons to the grand jurors unknown", but no evidence was introduced in support of this allegation. The proof introduced by the government was limited to the three defendants named in the indictment. The jury acquitted Huggler and Esara and convicted the appellant as a lone conspirator. Under these circumstances, the motion in arrest of judgment should have been granted. One person cannot be guilty of the crime of conspiracy. An unlawful agreement is essential and this contemplates, of necessity, more than one person.

Bartkus v. U. S., 21 F. 2nd. 425.
U. S. v. Austin, 31 F. 2nd. 229.
Feder v. U. S., 257 Fed. 694.
Browne v. U. S., 145 Fed. 1.

In the case first cited, *Bartkus v. U. S.*, the rule is thus clearly stated:

> "The verdict and judgments against *Kelps, Nevar and Dronsmith* cannot stand; and as one person alone cannot commit the crime of conspiracy, and as there is no evidence to support the averment as to other conspirators unknown, the verdict and judgment as to Bartkus must also be set aside."

We respectfully submit that the judgment of the lower court herein should be reversed.

Respectfully submitted,

T. D. PAGE,
Attorney for Appellant,
1002 American Bank Bldg.,
Seattle, Washington.

No. 6175

In the United States Circuit Court of Appeals

For the Ninth Circuit

AMANDO DIDENTI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellee

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division

ANTHONY SAVAGE
United States Attorney

JOSEPH A. MALLERY
Assistant United States Attorney

324 Federal Building, Tacoma, Washington

No. 6175

In the United States Circuit Court of Appeals

For the Ninth Circuit

AMANDO DIDENTI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellee

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division

ANTHONY SAVAGE
United States Attorney

JOSEPH A. MALLERY
Assistant United States Attorney
324 Federal Building, Tacoma, Washington

STATEMENT OF THE CASE

The appellant Amando Didenti, and two others, John Huggler and Jack Esara, were charged by indictment with conspiring together and "with sundry and divers other persons to the grand jurors unknown," to violate the National Prohibition Act (Tr. p. 2). After a trial, the jury acquitted Huggler and Esara, but convicted the appellant. (Tr. p. 7.)

After the verdict was rendered, the appellant interposed a motion in arrest of judgment on the ground that he could not, alone, be guilty of conspiracy. (Tr. p. 10.)

The evidence introduced in the trial of the case showed that three Federal Prohibition agents could detect odor of fermenting mash at a distance from the location of the still in question which was on the premises of John Huggler on East 64th Street, Tacoma, Washington, and upon examination the officers found the still not in operation.

Jack Esara and John Huggler entered the still-house and were there for about ten minutes, and were arrested when they started to leave. The agents then waited about an hour, and the appellant drove up to the still-house in a Chrysler sedan which contained

400 lbs. cerolose sugar; 400 lbs. Argo corn sugar; three 10-gallon kegs, and 50 lbs. of yeast. (Tr. p. 11.) Appellant was placed under arrest at this time.

Federal agents further testified that they did not know about Guarrazino Guarrazi in connection with this still until after the indictment in this case was returned. (Tr. p. 12.)

The testimony showed that on or about July 29, 1929, Guarrazi hired Esara to operate the still for $150.00 a month. On August 2, 1929, the appellant went to Esara's house and took him in his car to the place where the still was located. (Tr. p. 15.)

Appellant testified that on the 2nd day of August, 1929, one Joe Pinsitti arranged for appellant to take the material found in the car at the time of the arrest to the address where the still was. He further testified that Joe Pinsitti had told him to take Jack Esara to the same place where he was arrested that evening (Tr. p. 13); that he had received $7.50 in advance, and he delivered the articles mentioned when he was through his work at eight o'clock. (Tr. p. 14.)

APPELLANT'S ASSIGNMENTS OF ERROR

I

The lower court erred in refusing to direct a verdict of acquittal in favor of the appellant.

II

The lower court erred in refusing to grant the appellant's motion for a new trial.

III

The lower court erred in denying appellant's motion in arrest of judgment interposed after the jury had acquitted all of his co-conspirators.

IV

The lower court erred in sentencing the appellant to serve a term of eight months in the county jail of Pierce County, Washington.

ARGUMENT

I

Appellant had driven Esara to the still, and that same evening had hauled a load of supplies, not reasonably suited for any purpose other than distilling.

"It is well understood that a conspiracy is rarely proved by direct evidence; that it is unuslly established by proof of facts and circumstances from

which its existence is inferred. If the inference is a natural and reasonable one, it is sufficient support for the finding of a conspiracy. Jelke v. United States (C. C. A.) 255 Fed. 264, 280; Applebaum v. United States (C. C. A.), 274 Fed. 43, 46."

Anstess v. United States, 22 Fed. (2nd) 594.

The case of *Pattis v. United States*, 17 Fed. (2nd) 562, cited by appellant, supports the United States in this case.

II

In subdivision II of appellant's argument, he contends that because two other named conspirators were acquitted, appellant's conviction cannot stand, on the ground that one person cannot be guilty of the crime of conspiracy. The cases cited by appellant are not in point.

Bartkus v. United States, 21 Fed. (2nd) 425, merely holds that one person cannot commit a crime of conspiracy.

United States v. Austin, 31 Fed. (2nd) 229, holds that the conviction of conspiracy of only one defendant cannot be sustained if *all* other principal conspirators are acquitted.

In *Feder v. United States*, 257 Fed. 694, the indictment did not allege that the defendants conspired with sundry and divers other persons to the grand jurors unknown, and hence is not in point.

In *Browne v. United States*, 145 Fed. 1, it was held that where two persons on trial for conspiracy had been found guilty, it was not error to refuse a new trial to one of the defendants and grant it to the other.

In this case, the appellant was charged with sundry and divers other persons to the grand jurors unknown, and the evidence introduced in the trial of the case showed that touching the averment as to divers and sundry other persons to the grand jurors unknown, the Government agents did not know of the connection of Guarrazi with the case until after the indictment was returned. So that, notwithstanding the acquittal of Esara and Huggler, the evidence was ample to establish a conspiracy between appellant and Guarrazi, and by appellant's own testimony, with Joe Pinsitti.

The case of *Anstess v. United States*, 22 Fed. (2nd) 594, is exactly in point. In that case plaintiff in error was found guilty upon an indicament charging him and one Raymond Johnston, and other persons whose names were unknown, with conspiring to unlawfully transport and sell intoxicating liquor. Johnson was acquitted. On page 595, the Court said:

"And, further, if the evidence warrants a finding that plaintiff in error conspired with a person not named as a defendant, it is sufficient."

It is respectfully submitted that the judgment should be affirmed.

ANTHONY SAVAGE,
United States Attorney,

JOSEPH A. MALLERY,
Assistant United States Attorney.

Federal Building,
Tacoma, Washington.

No. 6177

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of
KEIZO KAMIYAMA,
On Habeas Corpus.

KEIZO KAMIYAMA,
Appellant,

vs.

WALTER E. CARR, Director of Immigration of the United States, for the Los Angeles District No. 31,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of
KEIZO KAMIYAMA,
On Habeas Corpus.

KEIZO KAMIYAMA,
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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

Attorneys for Appellant:

J. EDWARD KEATING and
THEODORE E. BOWEN, Esqs.,
Chapman Bldg., Los Angeles, California.

Attorneys for Appellee:

SAMUEL W. McNABB, Esq.,
United States Attorney;
P. V. DAVIS, Esq.,
Assistant United States Attorney.
Federal Building, Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of)	
)	
KEIZO KAMIYAMA,)	No. 9775-M.
)	CITATION.
On Habeas Corpus.)	
)	

TO WALTER E. CARR, District Director, United States Immigration Service, District No. 31: GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 28th day of June, A. D., 1930, pursuant to an Order Allowing Appeal, filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain proceedings, known as In the Matter of KEIZO KAMIYAMA, On Habeas Corpus, No. 9775-M, and you are ordered to show cause, if any there be, why the judgment in the said cause mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Paul J. McCormick, United States District Judge for the Southern District of California, this 28th day of May, A. D. 1930, and of the Independence of the United States, the one hundred and fifty-fourth.

Paul J. McCormick

United States District Judge for the Southern District of California.

[Endorsed]: No 9775-M. In the United States District Court In and for the Southern District of California Central Division In the Matter of Keizo Kamiyama, On Habeas Corpus. Citation. Received copy of the within Citation this 27 day of May 1930 P. V. Davis Attorney for Respondent Filed May 28 1930 R. S. Zimmerman, Clerk By W. E. Gridley Deputy Clerk J. Edward Keating and Theodore E. Bowen Attorneys at Law 1212 Chapman Building Los Angeles, Cal. Trinity 7033 Attorneys for Petitioner & Appellant

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IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of	
KEIZO KAMIYAMA,	No. COMPLAINT AND PETITION FOR WRIT
On Habeas Corpus.	OF HABEAS CORPUS

The complaint and petition of KEIZO KAMIYAMA respectfully shows:

I.

That your petitioner is an alien, a native of Japan, and is an inhabitant and resident of the County of Los Angeles, State of California; that your petitioner last entered the United States on or about February 13, 1920, and ever since that time has been continuously a resident of and an inhabitant of the United States, and has never since that time been outside of the United States.

II.

That your petitioner is now actually imprisoned and restrained of his liberty and detained by color of authority of the United States, in the custody of Walter E. Carr, District Director, District No. 31, Immigration Service, Department of Labor of the United States of America, to-wit, in the City of Los Angeles, State of California; that said imprisonment, restraint and detention is unlawful and illegal, and the illegality thereof consists of the facts herein alleged.

III.

That the sole claim or authority by virtue of which the said Walter E. Carr, District Director of the Immigration Service as aforesaid so restrains this petitioner is a certain warrant issued by the Secretary of Labor of the United States, ordering and directing the deportation of your petitioner to Japan, solely on the following alleged grounds and reasons and findings:

(a) That he was not at the time of his entry in possession of an unexpired Immigration visa;

(b) That he is an alien ineligible to citizenship, not exempted by Paragraph C, Section 13, of the Immigration Act of 1924 from the operation of that act.

IV.

That there is no evidence to sustain any of the grounds or reasons or findings upon which the said warrant of deportation was based, and that the uncontradicted evidence affirmatively establishes that your petitioner has been a resident of the United States continuously for more than five years prior to the institution of said deportation proceedings.

V.

That said grounds and said reasons and said findings are not sufficient, nor are any of them sufficient, nor do any or all of them state facts sufficient to authorize the deportation of your petitioner, in that your petitioner has been continuously domiciled in the United States for more than five years prior to the institution of said deportation proceedings; that your petitioner last entered the United States on or about said 13th day of February 1920, and that said deportation proceedings were not instituted until November 17, 1928.

VI.

That the Secretary of Labor of the United States, and those acting in aid and assistance of him, acted unfairly, arbitrarily and exceeded their authority and abused their discretion, and deprived your petitioner of due process of law, in that the entire proceedings against your petitioner, including the warrant for the arrest of your petitioner and the hearing thereon and the proceedings against your petitioner denied him a fair hearing and deprived him of his liberty without due process of law, and all of the said deportation proceedings against your petitioner were unfair, and deprived him of due process of law in each and every of the following particulars, to-wit:

(a) That the said Secretary of Labor and the Immigration inspectors trying your petitioner's case in aid and assistance of said Secretary of Labor, and said respondent considered evidence outside the record, the testimony of witnesses outside the record, without confronting your petitioner with the witnesses and their testimony, and without advising the petitioner or his counsel of the same, and without giving your petitioner or his counsel an opportunity to rebut it.

(b) That your petitioner was taken into custody without a warrant of arrest or other authority, and placed in confinement and forced to make a statement against his will, upon which said warrant of deportation is based.

VII.

That petitioner has not in his possession a copy of the Immigration records and evidence of proceedings applicable to the deportation of your petitioner, and cannot procure a copy thereof to file with this petition; but your petitioner prays that respondent be ordered to file with this court a certified copy of said proceedings and the whole thereof, and your petitioner stipulates and agrees when said records and evidence are received and presented for consideration, that said records and evidence be of the same force and effect as if filed herewith as part and parcel of this petition.

VIII.

That no previous application for a writ of habeas corpus has been made in this matter.

IX.

That your petitioner has not given said respondent notice that this petition is to be presented to this court, but this matter cannot be heard on notice for the reason that petitioner is now in custody and respondent is threatening to deport your petitioner before an application pursuant to such a notice could be made and acted upon by this court.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue out of and under the seal of this court, directing the said Walter E. Carr, District Director of Immigration Service as aforesaid, to have the

body of said petitioner before this honorable court at a time and place to be in said writ specified, together with the true cause of his detention, to the end that due inquiry may be had in the premises, and your petitioner prays that this court may proceed in a summary way to determine the facts in the case and the legality of petitioner's imprisonment, restraint and detention, thereupon to dispose of petitioner as law and justice require.

J. Edward Keating
J. Edward Keating
Theodore E. Bowen
Theodore E. Bowen.
Attorneys for Petitioner.

STATE OF CALIFORNIA,)
) SS.
COUNTY OF LOS ANGELES.)

KEIZO KAMIYAMA, being first duly sworn on oath, deposes and says:

That he is the petitioner in the above entitled action; that he has read the foregoing petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

Keizo Kamiyama

Subscribed and sworn to before me this 1st day of Aug. 1929.

[Seal] Frank E. Carleton
Notary Public in and for said County and State.

LET THE WRIT OF HABEAS CORPUS PRAYED FOR issue returnable before the court at 10 o'clock A. M., on the 16 day of Sept., 1929.

Pending hearing and the order thereon, it is ordered that petitioner be released on furnishing bail in the sum of $500.00.

DATED: Aug. 1st, 1929.

Wm P James
JUDGE.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of	)	
	)	
KEIZO KAMIYAMA,	)	No.
	)	POINTS AND
On Habeas Corpus.	)	AUTHORITIES
	)	

Petitioner presents in support of his petition the following points and authorities:

Ungar vs. Seaman (C. C. A. 8th 1924) 4 Fed. (2d) 80;

In re Chan Foo Lin (C. C. A. 6th 1917) 243 Fed. 137;

Ex parte Cheung Tung (D. C. W. D. Wash. 1923) 292 Fed. 997;

Ex parte Tozier (D. C. Maine 1924) 2 Fed. (2d) 268;

Whitfield vs. Hanges (C. C. A. 8th 1915) 222 Fed. 745;

Kwock Jan Fat vs. White (1920), 253 U. S. 455; 64 L. Ed. 1010;

Svarney vs. U. S. (C. C. A. 8th 1925) 7 Fed. (2d) 515;

In re Can Pan (C. C. A. 9th 1909) 168 Fed. 479;

Ex parte Radovieff (D. C. Mont. 1922) 278 Fed. 227;

McDonald vs. Sin Tak Sam (C. C. A. 8th 1915) 225 Fed. 710;

Ex parte Jackson (D. C. Mont. 1920) 263 Fed. 110;

Ex parte Plastino (D. C. Wash. 1916) 236 Fed. 295;

U. S. ex rel. Mittler vs. Curran, (C. C. A. 2nd 1925) 8 Fed. (2d) 355.

J. Edward Keating
J. Edward Keating
Theodore E. Bowen
Theodore E. Bowen
Attorneys for Petitioner

[Endorsed]: No. 9775 M. In the United States District Court in and for the Southern District of California, Central Division. In the Matter of Keizo Kamiyama, on Habeas Corpus. Complaint and petition for writ of habeas corpus, and points and authorities. Received copy of the within this 1 day of Aug. 1929. Walter E. Carr, by Harry B. Blee. Filed Aug. 1, 1929 at.....min past..... o'clock .....M R. S. Zinmerman, Clerk, by Louis J. Somers, Deputy. J. Edward Keating and Theodore E. Bowen, Attorneys at law, 1212 Chapman Building, Los Angeles, Cal. Trinity 7033, attorneys for petitioner.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of)	
)	
KEIZO KAMIYAMA,)	No.....
)	WRIT OF HABEAS
On Habeas Corpus.)	CORPUS.
)	

The President of the United States to WALTER E. CARR, Director of Immigration of the United States, for the Los Angeles District No. 31, GREETING:

You are hereby commanded to have the body of KEIZO KAMIYAMA, by you imprisoned, by whatever name he shall be called, the petitioner for a Writ of Habeas Corpus in the above entitled case, before the above entitled court and the Honorable PAUL J. McCORMICK, Judge of said Court, at the court room of said Court in the City of Los Angeles, California, on the 16 day of August, 1929, at 10 *M.*, to do and receive what shall then and there be commanded in the premises, and have you then and there this Writ.

WITNESS The Honorable PAUL J. McCORMICK, Judge of the said United States District Court, for the Southern District of California, Central Division.

DATED: Aug 1st, 1929.

R. S. ZIMMERMAN, Clerk

[Seal] By Louis J. Somers

[Endorsed]: No 9775 M. In the United States District Court, in and for the Southern District of California, Central Division. In the matter of Keizo Kamiyama, on

habeas corpus. Writ of habeas corpus. Received copy of the within this 1st day of Aug. 1929. Walter E. Carr, by Harry B. Blee. Filed Sep. 16, 1929. R. S. Zimmerman, Clerk, by Louis J. Somers, Deputy Clerk. J. Edward Keating and Theodore E. Bowen, attorneys at law 1212 Chapman Building, Los Angeles, Cal. Trinity 7033, attorneys for petitioner

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IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

In the Matter of	)	
	)	
KEIZO KAMIYAMA	)	No. 9775-M
	)	RETURN TO WRIT OF
For a Writ of	)	HABEAS CORPUS
Habeas Corpus	)	

I, Walter E. Carr, District Director of the United States Immigration Service, Immigration District No. 31, at Los Angeles, California, for my Return to the Writ of Habeas Corpus issued in the above case, admit, deny, and allege as follows:

I.

That KEIZO KAMIYAMA, Petitioner herein, is a citizen of Japan, and of the Japanese race, that he entered the United States near the port of Calexico, California, subsequent to the first day of July, 1924, and that such entry was without inspection under the Immigration laws of the United States; that Petiitoner was found by Immigration Officers near Venice, California, on or about the

16th day of November, 1928, without documentary evidence in his possession, showing his right to be and remain in the United States, that Petitioner was thereafter taken to San Pedro, California, where he was accorded an examination on the 17th day of November, 1928, relative to his presence in the United States; that at the conclusion of said hearing, and on the 17th day of November, 1928, a telegraphic application for a warrant for Petitioner's arrest was made to the Secretary of Labor, and that the said Secretary of Labor thereafter caused his warrant of arrest to be issued directing that said Petitioner be taken into custody and examined as to his right to be and remain in United States. Respondent alleges that Petitioner was taken into custody as authorized by the warrant aforesaid, and that he was subsequently released under bond pending the decision of his case by the Secretary of Labor. Respondent further alleges that on the 25th day of January, 1929, and subsequently thereto, hearing was accorded Petitioner under the warrant aforesaid at which hearing Petitioner was represented by Attorney Mr. J Edward Keating of Los Angeles, California. At said hearing the evidence upon which the warrant of arrest had been issued was presented to the Petitioner and his Counsel, and the hearing was conducted in accordance with the rules and regulations prescribed by the Secretary of Labor. At conclusion thereof, the record was transmitted to the Secretary of Labor at Washington, D. C., and associate Counsel Mr. Charles E. Booth of Washington, represented Petitioner and filed a brief in Petitioner's behalf with the Board of Review of the United States Department of Labor. Respondent further alleges that on the 21st day of June, 1929, the Secretary of Labor

caused his warrant to be issued directing deportation of the Petitioner to Japan, it having been found that Petitioner, who entered the United States near the port of Calexico, California, subsequent to the 1st day of July, 1924, was subject to deportation under Section 19 of the Immigration Act of February 5, 1917, being deportable under the provisions of a law of the United States, to wit:

"The Immigration Act approved May 26, 1924, in that he was not, at the time of his entry, in possession of an unexpired Immigration Visa; and that he is an alien ineligible to citizenship, and not exempted by Paragraph (c), Section 13 thereof, from the operation of the said Act."

Thereafter Respondent called upon the Surety Company which had executed bond in behalf of the Petitioner to produce him for deportation to Japan, in accordance with the terms of the bond. The Petitioner was delivered in accordance with the terms of the bond and Respondent was preparing to deport Petitioner to Japan when this Habeas Corpus proceeding was instituted.

II.

Respondent denies that part of Paragraph numbered I of the Petition, wherein it is alleged that Petitioner last entered the United States on or about the 13th day of February, 1920, and alleges that entry of said Petitioner into the United States occurred subsequent to the 1st day of July, 1924. Respondent admits that part of the allegation appearing in Paragraph numbered I of the Petition, wherein it is alleged that Petitioner is an alien, a native of Japan, and a resident of the county of Los Angeles, State of California. Respondent denies that part

of Paragraph numbered I of the Petition, wherein it is alleged that Petitioner has been a resident of, and an inhabitant of the United States continuously since the 13th day of February, 1920, and alleges that Respondent last entered the United States subsequent to the 1st day of July, 1924.

III.

Respondent denies that part of Paragraph numbered II of the Petition, wherein it is alleged that Petitioner is now actually in prison and restrained of his liberty by Respondent herein, and in answer thereto, Respondent alleges that Petitioner is now at liberty under bond fixed by and furnished to this Honorable Court. Respondent admits, however, that he holds his warrant issued by the Secretary of Labor directing deportation of Petitioner to Japan.

IV.

While denying that he is actually restraining the Petitioner from his liberty, as set forth in Paragraph numbered III of the Petition, Respondent admits that he holds a warrant of deportation directing return of Petitioner to Japan, for the reasons stated in Paragraph numbered III of the Petition.

V.

Respondent denies the allegations appearing in Paragraph numbered IV of the Petition, wherein it is charged that there is no evidence to sustain any of the grounds or reasons or findings upon which said warrant of deportation was based. Respondent further denies that the uncontradicting evidence affirmatively establishes that Petitioner has been a resident of the United States continuously for more than five years prior to the institution of said deportation proceedings. In answer thereto, Re-

spondent alleges that there is ample evidence to sustain the grounds upon which the order of deportation was based. Respondent further alleges in answer thereto, that the evidence in the record does not affirmatively establish that Petitioner has been a resident of the United States continuously for more than five years, prior to institution of deportation proceedings. Respondent denies the truth of the allegation appearing in Paragraph numbered V of the Petition, wherein it is alleged that said grounds and said reasons and said findings are not sufficient to authorize the deportation of Petitioner for the reason that Petitioner has been continuously domiciled in the United States for more than five years, prior to the institution of said deportation proceedings. In answer thereto, Respondent alleges that the grounds and reasons and findings of aforesaid, are each and every one sufficient, and each and every one does state facts sufficient to authorize deportation of Petitioner. Respondent further alleges that Petitioner has not been continuously domiciled within the United States for more than five years prior to the institution of deportation proceedings. Respondent further denies that Petitioner last entered the United States on or about the 3rd day of February, 1920.

VII.

Respondent denies the allegation appearing in Paragraph numbered VI of the Petition, wherein it is set forth that the Secretary of Labor of the United States, and those acting in aid and assistance of him, acted unfairly, arbitrarily, and exceeded their authority, and abused their discretion, and deprived Petitioner of due process of law, in that the entire proceedings against Petitioner, including the warrant of arrest, and the hearing thereon, were

unfair and deprived him of his liberty without due process of law. In answer thereto, Respondent alleges that the Secretary of Labor, and those acting in aid and assistance of him, acted fairly and did not abuse or exceed their authority or discretion, nor did they deprive Petitioner of his liberty without due process of law.

Respondent denies the allegation set forth in Paragraph numbered VI (a) of the Petition, wherein it is alleged that the Secretary of Labor, said Respondent, and the Immigrant Inspectors handling case of Petitioner, considered evidence and testimony outside the record without confronting Petitioner with the witnesses and their testimony, and without advising Petitioner and his Counsel of the same and without giving Petitioner and his Counsel an opportunity to rebut it. In answer thereto, Respondent refers to the original Department of Labor's record file herewith and alleges that the aforesaid record clearly indicates that Petitioner and his Counsel were advised of all evidence introduced, and had an opportunity to cross-examine such witnesses as they desired to cross-examine, and to furnish any evidence in their possession, to rebut that introduced by the Inspectors conducting the case against Petitioner.

In answer to the allegation contained in Paragraph numbered VI (b) of the Petition, Respondent denies the allegation that Petitioner was "forced to make a statement against his will", and in answer thereto refers to Petitioner's statement of the 17th day of November, 1928, appearing in the aforementioned record, from which it will be noticed that Petitioner was requested to make a voluntary statement, and was advised that said statement might be used against him in subsequent proceedings.

VIII.

Petitioner is not now in Respondent's custody, but is at liberty under bond authorized by this Honorable Court. It is impossible therefore, for Respondent to produce the body of Petitioner before this Honorable Court.

WHEREFORE, Respondent prays dismissal of this Writ of Habeas Corpus and further prays that the alien, KEIZO KAMIYAMA, in whose behalf said Writ was issued be remanded to Respondent's custody for deportation, in accordance with law.

Walter E Carr
Walter E. Carr
District Director
Respondent

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

WALTER E. CARR, District Director of the United States Immigration Service, District No. 31, being first duly sworn, deposes and says that he is the person who makes the foregoing return: that he has read same and knows the contents thereof, and that same is true, except as to matters therein alleged on information and belief, and as to those matters that he believes it to be true.

Walter E Carr
(Walter E. Carr)

Subscribed and sworn to before me this 16th day of September, 1929.

R S Zimmerman
[Seal] Clerk of United States District Court
By.....
Deputy

[Endorsed]: No. 9775-M In the District Court of the United States for the Southern District of California In the Matter of Keizo Kamiyama On Habeas Corpus Return to Writ of Habeas Corpus Rec'd Copy J. Edward Keating 9/16/29. Filed Sep 16, 1929 R. S. Zimmerman, Clerk. By Louis J. Somers, Deputy Clerk

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At a stated term, to wit: The September Term, A. D. 1929, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 16th day of September, in the year of our Lord one thousand nine hundred and twenty-nine.

Present:

The Honorable F. C. JACOBS, District Judge.

In the Matter of the Petition of Keizo Kamiyama for a Writ of Habeas Corpus.	No. 9775-M. Crim.

This matter coming on for hearing on return of Writ of Habeas Corpus; J. Edward Keating, Esq., appearing for petitioner, Gwyn Redwine. Assistant United States Attorney, appearing as counsel for the Government, and Keizo Kamiyama petitioner in cause No. 9775-M Criminal being present, in said action; Gwyn Redwine, Esq. files Return and Record of Immigration Department, and it is stipulated that Writ be considered as traverse to return, and it is ordered that this matter be submitted on briefs 20x20x10.

At a stated term, to-wit: The February Term, A. D. 1930 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the city of Fresno, on Monday the 3rd day of March in the year of our Lord one thousand nine hundred and thirty.

Present:

The Honorable Paul J. McCormick, District Judge.

United States of America, Plaintiff,	
vs.	No. 9775-M. Crim.
Keizo Kamiyama, Defendant	

The Writ of Habeas Corpus heretofore issued herein, is discharged, and the alien Keizo Kamiyama is remanded into custody of the Immigration Officers for deportation to Japan under Warrant of Secretary of Labor, and pursuant to law. Written Conclusion of Court is filed herein.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

In the matter of	
KEIZO KAMIYAMA,	
for a writ of Habeas Corpus.	Conclusion of the Court in Habeas Corpus proceeding.

Upon examination of the record in this matter it can not be said that the hearings before the Immigration

authorities were unfair, and it appears that the findings and warrant of the Secretary of Labor are supported by competent evidence. In this situation the Court should not interfere, and accordingly the writ of Habeas Corpus heretofore issued herein is dismissed and discharged, and the alien is remanded into the custody of the immigration officers for deportation to Japan under the warrant of the Secretary of Labor and pursuant to law. Ex parte Kishimoto, 32 Fed. 2d, 991; Plane vs. Carr, 19 Fed. 2d, 470; Chan Wong vs. Nagel, 17 Fed. 2d, 987.

Dated Mar. 3, 1930.

Paul J. McCormick,
United States District Judge

[Endorsed]: No. 9775-M Cr. Re Petition of Keizo Kamiyama for a Writ of Habeas Corpus. Conclusions of Court. Filed Mar. 3, 1930. R. S. Zimmerman, Clerk, By Louis J. Somers, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of	)	
	)	
KEIZO KAMIYAMA,	)	No. 9775-M.
	)	ASSIGNMENTS OF
On Habeas Corpus.	)	ERROR.
	)	

Comes now KEIZO KAMIYAMA, petitioner and detained, and assigns error in the decision of the said District Court for the Southern District of California, Central Division, as follows:

I.

The court erred in remanding Keizo Kamiyama to the custody of the United States Immigration Service for deportation.

II.

The court erred in holding and deciding that the writ of habeas corpus should be dismissed and discharged.

III.

The court erred in holding and deciding that there was some evidence to sustain the findings on which the warrant of the Secretary of Labor of the United States for the deportation of Keizo Kamiyama was based.

IV.

The court erred in holding and deciding that Keizo Kamiyama was given a fair hearing before the United States Immigration Service.

V.

The court erred in holding and deciding that the deportation of Keizo Kamiyama was not barred by the provisions of Section 19 of the Immigration Act of February 5, 1917.

DATED: May 26, 1930.

J. Edw. Keating
J. Edward Keating
and
Theodore E. Bowen
Theodore E. Bowen
Attorneys for Petitioner.

[Endorsed]: No. 9775-M. In the United States District Court, in and for the Southern District of California, Central Division. In the Matter of Keizo Kami-

yama, on habeas corpus. Assignments of error. Received copy of the within assignments of error this 27 day of May, 1930. P. V. Davis, attorney for respondent. Filed May 28, 1930. R. S. Zimmerman, Clerk, by W. E. Gridley, Deputy Clerk. J. Edward Keating and Theodore E. Bowen attorneys at law, 1212 Chapman Building Los Angeles, Cal. Trinity 7033. Attorneys for petitioner.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of)	
)	
KEIZO KAMIYAMA,)	No. 9775-M.
)	PETITION FOR
On Habeas Corpus.)	APPEAL.
)	

KEIZO KAMIYAMA, petitioner above named, deeming himself aggrieved by the order and judgment entered herein on the 3rd day of March, 1930, does hereby appeal from said order and judgment to the United States Circuit Court of Appeals, for the Ninth Circuit, and prays that a transcript and record of proceedings and papers on which said order and judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Judicial District of the United States.

DATED: May 26, 1930.

J Edw Keating
J. Edward Keating
and
Theodore E. Bowen
Theodore E. Bowen
Attorneys for Petitioner.

[Endorsed]: No 9775-M. In the United States District Court In and for the Southern District of California Central Division In the matter of Keizo Kamiyama, On Habeas Corpus. Petition for Appeal. Received copy of the within Petition this 27 day of May 1930 P. V. Davis Attorney for Respondent Filed May 28 1930 R. S. Zimmerman, Clerk By W. E. Gridley Deputy Clerk J. Edward Keating and Theodore E. Bowen Attorneys at Law 1212 Chapman Building Los Angeles, Cal. Trinity 7033 Attorneys for Petitioner and Appellant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of	
KEIZO KAMIYAMA,	No. 9775-M.
On Habeas Corpus.	ORDER ALLOWING APPEAL AND FIXING CUSTODY OF KEIZO KAMIYAMA.

Now, to-wit, on the 28th day of May, 1930, it is ordered that the appeal be allowed as prayed for; and it is further ordered that Keizo Kamiyama, pending said appeal, shall be released upon the giving of a good and sufficient bond in the sum of $500.00.

It is further ordered that the amount of cost bond on said appeal be, and hereby is, fixed in the sum of Two Hundred Fifty ($250.00) Dollars, to be conditioned as required by law and the rules of this court.

Done in open court this 28th day of May, 1930.

Paul J. McCormick

JUDGE.

[Endorsed]: No 9775-M. In the United States District Court In and for the Southern District of California Central Division In the Matter of Keizo Kamiyama, On Habeas Corpus. Order Allowing Appeal and Fixing Custody of Keizo Kamiyama. Received copy of the within order this 27 day of May 1930 P. V. Davis Attorney for Respondent Filed May 28 1930 R. S. Zimmerman, Clerk By W. E. Gridley Deputy Clerk J. Edward Keating and Theodore E. Bowen Attorneys at Law 1212 Chapman Building Los Angeles, Cal. Trinity 7033 Attorneys for Petitioner & Appellant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of	)	
	)	
KEIZO KAMIYAMA,	)	No. 9775-M.
	)	NOTICE OF APPEAL.
On Habeas Corpus.	)	
	)	

TO WALTER E. CARR, Respondent, and to S. W. McNABB, United States Attorney, Attorney for Respondent:

You, and each of you, will please take notice that the petitioner above named, Keizo Kamiyama, in the above entitled cause, hereby appeals to the United States Circuit Court of Appeals, for the Ninth Circuit, from the judgment and order remanding said Keizo Kamiyama to the custody of said Walter E. Carr, entered in the above entitled cause on the 3rd day of March, 1930, and that

the certified transcript of record will be filed in the said Appellate Court within thirty days after the filing of this notice.

DATED: May 26, 1930.

J. Edw Keating
J. Edward Keating
and
Theodore E. Bowen
Theodore E. Bowen.
Attorneys for Petitioner and Appellant.

[Endorsed]: No 9775-M. In the United States District Court In and for the Southern District of California Central Division In the Matter of Keizo Kamiyama, On Habeas Corpus. Notice of Appeal. Received copy of the within Notice this 27 day of May 1930 P. V. Davis Attorney for Respondent. Filed May 28 1930 R. S. Zimmerman, Clerk By W. E. Gridley Deputy Clerk J. Edward Keating and Theodore E. Bowen Attorneys at Law 1212 Chapman Building Los Angeles, Cal. Trinity 7033 Attorneys for Petitioner & Appellant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of	)	No. 9775-M.
	)	STIPULATION
KEIZO KAMIYAMA,	)	REGARDING ORIGINAL
	)	RECORDS AND FILES
On Habeas Corpus.	)	OF DEPARTMENT
———————	)	OF LABOR.

IT IS HEREBY STIPULATED AND AGREED by and between J. Edward Keating and Theodore E. Bowen, Attorneys for Keizo Kamiyama, appellant, and S. W. Mc-

Nabb, Attorney for Walter E. Carr, District Director of the Immigration Service, Appellee, that the original files and records of the Department of Labor covering the deportation proceedings against the petitioner, which were filed in the hearing in the above entitled cause, may be by the Clerk of this court sent up to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, as part of the Appellate record, in order that the said original immigration files may be considered by the Circuit Court of Appeals for the Ninth Circuit in lieu of a certified copy of said records and files and that said original records may be transmitted as part of the Appellate record.

DATED: May 26, 1930.

J. Edw Keating
J. Edward Keating
and
Theodore E. Bowen
Theodore E. Bowen
Attorneys for Petitioner and Appellant.

S. W. McNABB,
U. S. Attorney,
By P. V. Davis
Assistant U. S. Attorney
Attorney for Respondent.

[Endorsed]: No 9775-M. In the United States District Court In and for the Southern District of California Central Division In the Matter of Keizo Kamiyama, On Habeas Corpus. Stipulation regarding Original Records and Files of Department of Labor. Filed May 28 1930 R. S. Zimmerman, Clerk By W. E. Gridley Deputy Clerk J. Edward Keating and Theodore E. Bowen Attorneys at Law 1212 Chapman Building Los Angeles, Cal. Trinity 7033 Attorneys for Petitioner & Appellant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of)	
)	No. 9775-M.
KEIZO KAMIYAMA,)	ORDER FOR
)	TRANSMISSION OF
On Habeas Corpus.)	ORIGINAL EXHIBITS.
)	

ON STIPULATION OF COUNSEL, it is by the court ordered that the original records in the United States Immigration office filed herein on the hearing of the return of the respondent, Walter E. Carr, District Director of the United States Immigration Service, to the writ of habeas corpus, be transmitted by the Clerk of this Court to the United States Circuit Court of Appeals for the Ninth Circuit, as original exhibits in lieu of a certified copy of said records and files and that the same need not be printed.

DATED: May 28th, 1930.

Paul J. McCormick
United States District Judge

[Endorsed]: No. 9775-M. In the United States District Court, in and for the Southern District of California, Central Division. In the matter of Keizo Kamiyama, on habeas corpus. Order for transmission of original exhibits. Received copy of the within order this 27 day of May, 1930. P. V. Davis, attorney for respondent. Filed May 28, 1930. R. S. Zimmerman, Clerk, by W. E. Gridley, Deputy Clerk. J. Edward Keating and Theodore E. Bowen, attorneys at law, 1212 Chapman Building, Los Angeles, Cal. Trinity 7033. Attorneys for petitioner & appellant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of)	
)	
KEIZO KAMIYAMA,)	No. 9775-M.
)	COST BOND ON
On Habeas Corpus.)	APPEAL.
)	

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned, Pacific Indemnity Company, is held and firmly bound unto Walter E. Carr, District Director of District No. 31, Immigration Service, and the United States of America, in the full and just sum of Two Hundred Fifty Dollars ($250.00), to be paid to the said Walter E. Carr, District Director aforesaid, and the United States of America, or their certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 29 day of May, 1930.

Whereas, lately the District Court of the United States, for the Southern District of California, Central Division, in a habeas corpus proceeding in said Court between petitioner, Keizo Kamiyama and the respondent, Walter E. Carr, District Director of Immigration as aforesaid, wherein an order, judgment and decree was rendered against the said Keizo Kamiyama, discharging the Writ of Habeas Corpus and remanding the said alien, Keizo

Kamiyama, to the custody of respondent, Walter E. Carr; and the said Keizo Kamiyama having obtained from said Court an appeal to reverse the order, judgment and decree in the aforesaid Habeas Corpus proceeding, and a Citation directed to the said Walter E. Carr, District Director as aforesaid, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, State of California, on the 28 day of June, 1930.

NOW, the condition of the above obligation is such that if the said Keizo Kamiyama shall prosecute *her* appeal to effect and answer all costs if *she* fails to make *her* plea good, then the above obligation to be void; otherwise, to remain in full force and virtue.

PACIFIC INDEMNITY COMPANY

By F. L. Hemming

[Seal] Attorney-in-Fact.

I hereby approve the foregoing bond.

Dated the 29th day of May 1930

Paul J. McCormick

Judge or Clerk

STATE OF CALIFORNIA,

SS.

County of Los Angeles

On this 29th day of May in the year one thousand nine hundred and 30, before me, CHAS. MALLEY a Notary

Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared F. L. Hemming known to me to be the duly authorized Attorney-in-Fact of PACIFIC INDEMNITY COMPANY, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Company, and the said F. L. Hemming acknowledged to me that he subscribed the name of PACIFIC INDEMNITY COMPANY, thereto as principal, and his own name as Attorney-in-Fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] Chas. Malley

Notary Public in and for.....County, State of California

My Commission Expires Oct. 31, 1932.

[Endorsed]: No 9775-M. In the United States District Court In and for the Southern District of California Central Division In the Matter of Keizo Kamiyama, On Habeas Corpus. Cost Bond on Appeal. Filed May 29 1930 R. S. Zimmerman, Clerk By W. E. Gridley Deputy Clerk J. Edward Keating and Theodore E. Bowen Attorneys at Law 1212 Chapman Building Los Angeles, Cal. Trinity 7033 Attorneys for Petitioner & Appellant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of)	
)	
KEIZO KAMIYAMA,)	No. 9775-M.
)	BAIL BOND ON
On Habeas Corpus.)	APPEAL.
)	

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned, Pacific Indemnity Company, is held and firmly bound unto Walter E. Carr, District Director of District No. 31, Immigration Service, and the United States of America, in the full and just sum of Five hundred Dollars ($500.00), to be paid to the said Walter E. Carr, District Director aforesaid, and the United States of America, or their certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 29 day of May, 1930.

WHEREAS, lately the District Court of the United States, for the Southern District of California, Central Division, in a habeas corpus proceeding in said Court between petitioner, Keizo Kamiyama, and the respondent, Walter E. Carr, District Director of Immigration as aforesaid, wherein an order, judgment and decree was rendered against the said Keizo Kamiyama, discharging the Writ of Habeas Corpus and remanding the said alien, Keizo Kamiyama, to the custody of respondent, Walter E.

Carr; and the said Keizo Kamiyama having obtained from said Court an appeal to reverse the order, judgment and decree in the aforesaid habeas corpus proceeding, and a Citation directed to the said Walter E. Carr, District Director as aforesaid, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, State of California on the 28 day of June, 1930,

NOW, the condition of the above obligation is such that if the said order, judgment and decree be affirmed, said Keizo Kamiyama will surrender *her*self to Walter E. Carr, District Director aforesaid, then this recognizance to be void; otherwise to remain in full force and virtue.

PACIFIC INDEMNITY COMPANY

By F. V. Weede

[Seal] Attorney-in-Fact.

I hereby approve the foregoing bond.

Dated the 29th day of May, 1930.

Paul J. McCormick

Judge or Clerk

STATE OF CALIFORNIA

ss.

County of Los Angeles

On this 29th day of May in the year one thousand nine-hundred and 30, before me, CHAS. MALLEY a Notary Public in and for said County and State residing therein, duly commissioned and sworn, personally appeared F. V. WEEDE, known to me to be the duly authorized Attorney-in-fact of PACIFIC INDEMNITY COMPANY, and the same person whose name is subscribed to the within instru-

ment as the Attorney-in-fact of said Company, and the said F. V. Weede acknowledged to me that he subscribed the name of PACIFIC INDEMNITY COMPANY, thereto as principal, and his own name as Attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] Chas. Malley

Notary Public in and for Los Angeles County, State of California.

My Commission Expires Oct. 31, 1932.

[Endorsed]: No. 9775-M. In the United States District Court, in and for the Southern District of California, Central Division. In the matter of Keizo Kamiyama, on habeas corpus. Bail bond on appeal. Filed May 29, 1930. R. S. Zimmerman, Clerk, by W. E. Gridley, Deputy Clerk. J. Edward Keating and Theodore E. Bowen, attorneys at law 1212 Chapman Building, Los Angeles, Cal. Trinity 7033 Attorneys for petitioner & appellant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of	
KEIZO KAMIYAMA,	No. 9775-M.
On Habeas Corpus.	PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please prepare and duly authenticate the transcript and following portions of the record in the above entitled case for appeal of the said appellant heretofore filed with the United States Circuit Court of Appeals, for the Ninth Circuit:

1. Complaint and petition for Writ of Habeas Corpus.
2. Order granting Writ of Habeas Corpus, and regarding custody of Keizo Kamiyama pending hearing thereon.
3. Writ of Habeas Corpus.
4. Return to Writ of Habeas Corpus.
5. Traverse to Return on Writ of Habeas Corpus.
6. Order Discharging Writ of Habeas Corpus and Remanding Keizo Kamiyama.
7. Petition for Appeal.
8. Order Allowing Appeal and Fixing Custody of Keizo Kamiyama.
9. Notice of Appeal.
10. Assignments of Error.

11. Stipulation that Original Files and Records in the Department of Labor be sent to the Clerk of the Circuit Court as part of the Appellate Record.
12. Order for Transmission of Original Exhibits
13. Cost Bond on Appeal, and Bail Bond on Appeal.
14. Citation.
15. This Praecipe.

DATED: May 26, 1930.

J Edw Keating
J. Edward Keating
and
Theodore E. Bowen
Theodore E. Bowen
Attorneys for Petitioner and Appellant.

[Endorsed]: No 9775-M. In the United States District Court In and for the Southern District of California Central Division In the Matter of Keizo Kamiyama, On Habeas Corpus. Praecipe for Transcript of Record on Appeal. Received copy of the within Praecipe this 27 day of May 1930 P. V. Davis Attorney for Respondent. Filed May 28 1930 R. S. Zimmerman, Clerk By W. E. Gridley Deputy Clerk J. Edward Keating and Theodore E. Bowen Attorneys at Law 1212 Chapman Building Los Angeles, Cal. Trinity 7033 Attorneys for Petitioner & Appellant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of	)	
	)	
KEIZO KAMIYAMA,	)	No. 9775-M.
	)	CLERK'S
On Habeas Corpus.	)	CERTIFICATE.
	)	

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 35 pages, numbered from 1 to 35 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, complaint and petition for writ of habeas corpus, writ of habeas corpus, return to writ of habeas corpus, traverse to return on writ of habeas corpus, order discharging writ of habeas corpus and remanding Keizo Kamiyama, assignments of error, petition for appeal, order allowing appeal and fixing custody, notice of appeal, stipulation regarding records and files of department of labor, order for transmission of original exhibits, cost bond on appeal, bail bond on appeal and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $.....and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the clerk for comparing, correcting and certify-

ing the foregoing record on appeal amount to.....and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of June, in the year of Our Lord One Thousand Nine Hundred and Thirty, and of our Independence the One Hundred and Fifty-fourth.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.
By
Deputy.

No. 6177.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of
KEIZO KAMIYAMA
For a Writ of Habeas Corpus.

Keizo Kamiyama,
Appellant,
vs.
Walter E. Carr, District Director, United States Immigration Service,
Appellee.

BRIEF OF APPELLANT, KEIZO KAMIYAMA.

J. Edward Keating,
Theodore E. Bowen,
Attorneys for Appellant.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

No. 6177.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of
KEIZO KAMIYAMA
For a Writ of Habeas Corpus.

Keizo Kamiyama,
Appellant,
vs.
Walter E. Carr, District Director,
United States Immigration Service,
Appellee.

BRIEF OF APPELLANT, KEIZO KAMIYAMA.

STATEMENT OF THE CASE.

This is an appeal from an order discharging a writ of habeas corpus and remanding Keizo Kamiyama to the custody of the United States Immigration Service. [Transcript of Record, page 19.]

The original records of the Department of Labor have been filed with the clerk of this court pursuant to an order of the District Court. [Transcript of Record, page

27.] Throughout this brief, we will refer to those records as "Immigration File." The printed transcript of the proceedings in the District Court will be referred to as "Transcript of Record."

Keizo Kamiyama is an alien subject of Japan, who was ordered deported from this country by the Secretary of Labor on two charges, to-wit: (a) That he was not at the time of his entry into the United States in possession of an unexpired Immigration visa; and (b) that he is an alien ineligible to citizenship and not exempted by Paragraph C of Section 13 of the Immigration Act of 1924 from the operation of that Act. (Immigration File, Warrant of Deportation.)

The facts regarding Keizo Kamiyama's entry into the United States and the facts surrounding the deportation proceedings against him will be fully set forth in the argument.

After Keizo Kamiyama had been ordered deported, and while in the custody of Walter E. Carr, District Director of Immigration at Los Angeles, he filed a petition for a writ of habeas corpus, alleging in substance that he had been in this country continuously for a period in excess of five years, that there was no evidence to sustain the warrant of deportation, and that he was not given a fair hearing. [Transcript of Record, pages 3 to 7.] The writ by order of the District Court [Transcript of Record, page 6] was issued and served. [Transcript of Record, pages 10 and 11.] Return was duly made. [Transcript of Record, pages 11 to 17.] It was stipulated in open court that the petition was to be considered for all purposes as a traverse. [Transcript of Record, page 18.] The evi-

dence adduced at the hearing on the writ consisted of the records of the United States Immigration Service now on file with the clerk of this court. Thereafter, the court made its order discharging the writ and remanding Keizo Kamiyama to the custody of the Immigration Service. [Transcript of Record, pages 19 and 20.] From that order this appeal is presented.

SPECIFICATIONS OF ERROR RELIED UPON.

The specifications of error relied upon by appellant are as follows:

Specification 1: The court erred in holding that the deportation of Keizo Kamiyama was not barred by the provisions of Section 19 of the Immigration Act of February 5, 1917. This is Assignment of Error No. 5, Transcript of Record.

Specification 2: The court erred in holding and deciding that there was some evidence to sustain the warrant of deportation. This is Assignments of Error 1, 2 and 3, Transcript of Record.

Specification 3: The court erred in holding that Keizo Kamiyama was given a fair hearing. This is Assignment of Error No. 4, Transcript of Record.

ARGUMENT.

In support of our contention that the Secretary of Labor had no authority to issue the warrant of deportation against Keizo Kamiyama, we urge two propositions: First, that there is no evidence to sustain the warrant of deportation, in that the evidence affirmatively and conclusively shows that Keizo Kamiyama had been contin-

uously in this country for a period in excess of five years before the institution of the deportation proceedings; and second, that Keizo Kamiyama was not given a fair hearing by the Immigration Service.

We will take up these points in the order named.

(A) There is no evidence to sustain the warrant of deportation:

It is undoubtedly conceded by respondent that no alien is deportable on the charges named in the warrant against Keizo Kamiyama if he has resided in the United States for a period in excess of five years before the institution of the proceedings by the issuance of the warrant of arrest. This period of limitation is laid down by Section 19 of the Immigration Act of February 5, 1917 (8 U. S. C. 155), which, among other things, provides:

> "That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported."

The Immigration File discloses that the proceedings were not instituted against Keizo Kamiyama until November 19, 1928. (Immigration File, Warrant of Arrest.) The evidence adduced before the Immigration Service showed that Keizo Kamiyama last entered this country in 1920. There is not a scintilla of evidence to the contrary. For the moment we will disregard the unfairness inherent throughout the hearing and discuss the evidence produced, notwithstanding the method by which some of it was obtained. At the preliminary examination of No-

vember 17, 1928, Keizo Kamiyama testified (Immigration File, page 1):

> "I last entered the United States at a point about two miles west of Calexico, California, coming from Mexicali, Mexico, on or about February 13, 1920, I came alone."

Again at the regular hearing of December 27, 1928, he reiterates his previous testimony (Immigration File, page 2):

> "Atty.: In this statement, you stated to Insp. Scott that you last entered the United States two miles west of Calexico on or about February 13, 1920; is that right? A. Yes, sir.
>
> Q. Have you ever been out of the United States since then? A. No."

The Immigration Service did not produce one word of testimony or any other kind of evidence to dispute the alien's claim that he last entered the United States in February, 1920. Kamiyama, on the other hand, corroborated his assertions by unimpeached documentary evidence, all of which was made a part of the record and attached thereto as exhibits. We invite the court to examine them. They were all introduced at the hearing of December 27, 1928, (Immigration File), and are as follows:

> *Alien's Exhibit A:* Envelope addressed to K. Kamiyama, postmarked Redondo Beach, California, February 15, 1922;
>
> *Alien's Exhibit 2:* Envelope addressed to K. Kamiyama, postmarked Palms, California, November 2, 1922;
>
> *Alien's Exhibit 3:* Receipt dated November 16, 1921, issued by the Japanese American to Keizo Kamiyama;

Alien's Exhibit 4: Entry in the 1922 edition of the "Japanese Who's Who in America," showing Kamiyama was here in that year;

Alien's Exhibit 5: Envelope addressed to Kamiyama Keizo postmarked Redondo Beach, California, November 1, 1921;

Alien's Exhibit 6: Receipt showing Keizo Kamiyama donated to the fund for the sufferers of the Yokohama earthquake in 1923.

At the hearing of December 27, 1928 (Immigration File) Keizo Kamiyama also minutely detailed the various places where he had worked and resided in California since his entry in 1920. At the continued hearing of March 13, 1929, K. Nishimoto, an American citizen, testified in further corroboration of Kamiyama's own testimony previously given. Part of his testimony is as follows (page 15):

"Q. Mr. Nishimoto you know Keizo Kamiyama, do you not? A. Yes.

Q. This boy sitting present here? A. Yes.

* * * * * * * * *

Q. So this man Keizo Kaimayama might have been working for three or four different foreman? A. Yes.

Q. And you had some 12 foreman at that time, operating some twelve places? A. Yes.

Q. And you don't know or remember exactly foreman he was working for one month and which one he was working for the next month? A. No.

Q. But you know he was on the place there a couple of years? A. Yes.

Q. In 1923 and 1924? A. Yes."

Not a single witness was called by the Immigration Service. No evidence was produced to show that any of

the documents were false or fraudulent. Certainly the Immigration Service cannot choose to disregard this positive testimony when none was offered to refute it. *U. S. ex rel Schachter v. Curran* (C. C. A. 3d 1925), 4 Fed. (2d) 356.

A perusal of the record will disclose that the government's case was based, not on evidence, but solely on vague suspicion and innuendo unsupported by any facts. They suspect that the alien at bar is not Keizo Kamiyama, but produce no evidence to this effect. *Furthermore, if he is not Keizo Kamiyama, why are they attempting to deport him as Keizo Kamiyama?* Likewise they suspect that he did not enter the United States in 1920, but produce no evidence to substantiate this suspicion.

Some reference is made by the immigration officials to certain small discrepancies between the alien's testimony at the preliminary examination (unfairly taken) and his testimony at the later stage of the proceedings. These discrepancies as to age, etc., are undoubtedly explained by the fact that the record of the preliminary investigation was taken down in longhand by the inspector at a time while the alien was in great fear and under implied, if not actual, coercion. Discrepancies as to immaterial matters certainly cannot be considered as a substitute for evidence. *Gung You v. Nagle* (C. C. A. 9th, 1929), 34 Fed. (2d) 848.

(B) Keizo Kamiyama was not given a fair hearing:

In any event, the practices engaged in by the immigration officials in the instant case were such as to deprive Keizo Kamiyama of a fair trial.

First—He was arrested without a warrant and interrogated while confined incommunicado and without bail;

Second—Evidence was received outside the trial and outside the presence of the accused and without notifying him or his counsel;

Third—Records and testimony taken in other cases were used against the alien without giving him the opportunity to cross-examine the witnesses therein or to explain or rebut their testimony;

Fourth—Anonymous communications were considered as evidence without giving the alien the opportunity of seeing, explaining or rebutting them.

We will now consider the circumstances surrounding the arrest of Keizo Kamiyama. The immigration record discloses that Keizo Kamiyama was arrested and locked up on November 17, 1928 (Immigration File), without a warrant and without any right or authorization whatsoever. A statement was taken from him on that day, November 17, 1928, and made the basis for a warrant of arrest which was issued on the 19th, or two days after he had been actually arrested. During that time he was held incommunicado and denied bail.

The first question is, may the statement taken in such a high-handed, arbitrary manner be made the basis of a warrant of deportation? If so, *unlimited* power is placed in the hands of any single immigration inspector in the service of the United States. He holds in his hands the liberty of every person in this country, be he alien or be he citizen. If an immigration inspector is clothed with the authority to arrest without warrant or charges, place

the person in secret confinement, and then proceed to hold a secret hearing without a reporter, write it up himself to suit himself, and then use that statement as the basis of deportation, then, we repeat, no one of us is safe. But we respectfully submit that the courts will not permit such tyranny in any civilized country.

It needs no citation of authority to establish that due process of law requires primarily that a deportation proceeding to be fair must be conducted in the manner prescribed by statute or at least in the manner prescribed by rules of the Department of Labor. Therefore, it should be noted that there is nothing in the immigration act itself nor in the rules adopted by the Department of Labor, authorizing or conferring upon an immigration inspector, or anyone else, the authority to arrest without a warrant.

Section 19 of the Immigration Act of 1917 (8 U. S. C. 155) enumerates the classes of aliens which may be deported, and provides:

> "* * * shall, *upon the warrant of the Secretary of Labor*, be taken into custody and deported."

Lest the foregoing section be ambiguous, Congress passed a later act clearly setting out the only cases in which an immigration official might arrest without a warrant. The Act of February 27, 1925 (8 U. S. C. 110) provides:

> "Any employee of the Bureau of Immigration authorized so to do under regulations prescribed by the Commissioner General of Immigration with the approval of the Secretary of Labor, shall have power without warrant (1) to arrest any alien *who in his presence or view is entering or attempting to enter*

> *the United States* in violation of any law or regulation made in pursuance of law regulating the admission of aliens, and to take such alien immediately for examination before an immigrant inspector or other official having authority to examine aliens as to their right to admission to the United States, and (2) to board and search for aliens any vessel within the territorial waters of the United States, railway car, conveyance, or vehicle, in which he believes aliens are being brought into the United States; and such employee shall have power to execute any warrant or other process issued by any officer under any law regulating the admission, exclusion, or expulsion of aliens. (Feb. 27, 1925, c. 364, Title IV, 43 Stat. 1049.)" (Italics ours.)

The very rules of the immigration service also provide that no immigration official shall arrest an alien without a warrant unless the alien is seen in the act of surreptitiously entering the United States. See rule 27, subdivision (f), paragraph 1, part of which provides as follows (Immigration Rules of March 1, 1927):

> "Any immigrant inspector, Chinese inspector acting as an immigrant inspector, or patrol inspector may, without warrant, arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation in pursuance of law regulating the admission of aliens, * * *."

The Department of Labor has also laid down rules governing the procedure in deportation proceedings, which we respectfully submit must be followed in order that the alien be accorded the fundamentals of due process of law. The present rule 18 covers this subject. Formerly this rule was No. 22, and in many of the older cases it is so referred to by the courts. Subdivision B, paragraph 1, of rule 18 (Immigration Rules of March 1, 1927), lays

down the manner of applying for a warrant for the arrest of an alien who is already in the United States as follows:

> "The application must state facts showing *prima facie* that the alien comes within one or more of the classes subject to deportation after entry, and, except in cases in which the burden of proof is upon the alien (Chinese) involved, should be accompanied by some substantial supporting evidence. If the facts stated are within the personal knowledge of the inspector reporting the case, or such knowledge is based upon admissions made by the alien, they need not be in affidavit form. But if based upon statements of persons not sworn officers of the government (except in cases of public charges covered by subdivision C hereof), the application should be accompanied by the affidavit of the person giving the information or by a transcript of a sworn statement taken from that person by an inspector."

The Department of Labor recognizes, however, that there are certain cases where prompt action is necessary, and so provides that a warrant of arrest in certain cases may be applied for and issued by telegraph. This is covered by subdivision D, paragraph 1, of rule 18, (Immigration Rules of March 1, 1927) as follows:

> "Upon receipt of a telegraphic or formal warrant of arrest the alien shall be taken before the person or persons therein named or described and granted a hearing to enable him to show cause, if any there be, why he should not be deported. Pending determination of the case, in the discretion of the immigration officer in charge, he may be taken into custody or allowed to remain in some place deemed by such officer secure and proper, except that in the absence of special instructions an alien confined in an institution shall not be removed therefrom until a warrant of deportation has been issued and is about to be served."

Thus, the rules of the Department itself do not permit an inspector to take an alien into custody prior to the receipt of a warrant of arrest. To be sure, these rules do not prevent an inspector from taking a *voluntary* statement from an alien prior to his application for the warrant of arrest, but plainly these rules do not authorize an immigration inspector to imprison an alien before he has even applied for a warrant, before any charges are pending, and by holding him incommunicado, force a statement out of him. The courts have refused to countenance such methods.

In *Bilokumsky v. Todd,* 263 U. S. 149, 68 L. Ed. 221, the Supreme Court held that a statement taken from an alien while *lawfully* in confinement could be used against him in deportation proceedings, but the court says at page 224, L. Ed.:

> "It may be assumed that evidence obtained by the department through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings, * * * but mere interrogation under oath by a government official of one *lawfully* in confinement, is not a search and seizure." (Italics ours.)

The only inference in the above quotation is that the taking of a statement from an alien unlawfully and illegally arrested would be tantamount to an unlawful search and seizure upon which deportation could not be predicated.

Charley Hee v. United States, (C. C. A. 1st.), 19 Fed. (2d) 335, involves a Chinese alien held at an immigration station without any process for two days, during which time a statement was taken from him. The statement thus taken from him was used at the hearing without ob-

jection by his counsel, either then or at the later hearing before the District Court. In the Circuit Court, counsel for the first time contended that the statement so taken should have been excluded and disregarded. The Circuit Court, by a two to three decision, refused to reverse the District Court, on the ground that the objection could not be made the first time in the Circuit Court, and on the further ground that there was other additional evidence, fairly taken, upon which the deportation could be sustained (which fact is not present in the case at bar). The Circuit Court held, however, that such a statement was obtained unfairly, the court saying (page 336):

> "The arrest and the ensuing imprisonment before the issue of the warrant were plainly illegal. The statute in question provides that 'any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its territories, may be arrested upon a warrant issued upon a complaint under oath, filed by any party on behalf of the United States.' 25 Stat. 476-479; U. S. Comp. Stats. 1916, par. 4313. The rules of the Department of Labor as we understand them, also provide that a warrant should be procured before the Chinese person is arrested. See rules 23 and 24. This is similar to the practice under the Immigration Act. The cases relied on by the government arose under a different statute (27 Stats. 25 (Comp. St. pars. 4315-4323)), relating to Chinese laborers, who failed or neglected to take out certificates of registration. See Fong Yue Ting v. United States, 149 U. S. 698, 728, 13 S. Ct. 1016, 37 L. Ed. 905.
>
> "That the statement was obtained by entirely unjustifiable methods is too clear for discussion. It would not be admissible against the defendant over objection by him in any judicial proceeding, and if used against him in administrative proceedings, where the tribunal itself is charged with the duty of safe-

> guarding the defendant's rights would vitiate the result. The present proceedings were civil in their nature and judicial in character. The defendant was represented before both the commissioner and the District Court by counsel, who, as above stated, made no objection to the use of the statement on either occasion. There is no assignment of error upon it. While the commissioner or the district judge might well on his own motion have refused to hear it, it would be going too far to say that their failure to do so constituted reversible error, or that this court hearing the case upon the same record as the District Court ought to entertain an objection to this evidence, here made for the first time. Such action would be justified only when necessary to correct a clear and grave miscarriage of justice."

Judge Anderson dissented from the view taken by the majority of the court, maintaining that the unfairness was so flagrant that it should have precluded the deportation, whether raised at the hearing or not, and said at page 340:

> "To seize the person and search the memory of the frightened victim is a far grosser invasion of personal liberty and disregard of due process of law than is the search for and seizure of papers, even from a home or from an office as in the Gouled case."

In the case at bar, counsel for Keizo Kamiyama at all times protested and objected to the high-handed methods of the Immigration Service in taking the statement from him. No waiver of his rights in this regard can be found in the record. In such a case the subjecting of an alien to deportation by such means should be prevented by the courts. This is the view taken in *U. S. ex rel Murphy v. McCandless* (D. C. E. D. Penn., 1930) 40 Fed. (2d) 643. We quote from pages 644 and 645:

"The dissenting opinion of Judge Anderson, in the case of Charley Hee v. U. S. (C. C. A.) 19 F. (2d) 335, 336, was cited to us as authority for the proposition that an unwarranted arrest and detention of an alien vitiated an order of deportation which followed the unlawful custody. It was authority because the trial court had refused to discharge such alien (Judge Anderson dissenting), and the Supreme Court had reversed the trial court without opinion, thus adopting the dissenting opinion as an expression of the grounds of reversal. Such an interpretation of the ruling of the Supreme Court was wholly unwarranted, as counsel for the United States has made clear. The ruling of the court, however, is of value. 'The arrest and the ensuing imprisonment before the issue of the warrant were plainly illegal.' The legal situation is said to be 'similar to the practice under the Immigration Act.' The relator there was denied the benefit of the principle laid down solely because no seasonable claim was made for relief. The dissenting opinion expressed the only difference among the judges. This was over, not the right, but the waiver. Judge Anderson's view is to be looked for in the emphatic sentence, 'It is high time to insist that law-enforcing officials be law-abiding in the performance of their official duties.' The court unanimously voiced condemnation of the wrong done. The majority held the relator had waived the right which the court held to be his. Judge Anderson's dissenting view was thus expressed, 'The way to stop such gross invasion of fundamentally important human rights is to refuse to affirm decisions grounded thereon.' It is clear therefore that had the right been seasonably asserted it would have been allowed. It was lost only because it was waived.

"Here there has been no waiver and the right must be given effect. The relator is charged with a failure to observe the immigration laws; she is sought to be condemned by another violation. This is what should not be permitted. This means that the relator

> must be discharged because subjected by unlawful means to the deportation order."

Thus, Keizo Kamiyama having been subjected to a deportation order through unlawful means, should be given his liberty.

Now passing to the second item of unfairness, it should be remarked that this case illustrates the inherent unfairness in the deportation procedure adopted by the United States Immigration Service. One inspector is detailed to handle the case throughout. The same man acts as arresting officer, jailer, inquisitor, investigator, prosecuting attorney, judge, jury, witness and reporter.

We have already demonstrated the unfair tactics used by the inspector as arresting officer, jailer and inquisitor. Now we must look into his activities as investigator. After Keizo Kamiyama had been held in jail two days incommunicado and without bail, on November 19, 1928, he was *officially* arrested.

Presumably the inspector realized that Kamiyama's statement, taken on November 17, was insufficient to support deportation. Therefore, he photographed Kamiyama and toured the countryside with this picture (whether it was a likeness or not does not appear), inquiring indiscriminately of various Japanese if they could identify the picture. Some could and, of course, some could not. A longhand report of these *ex parte* investigations was kept by this same inspector, and was later written up, identified by him as a witness, and admitted in evidence by him as judge.

These *ex parte* examinations appear in the records as statements taken on November 23, 1928. A summary of them is:

1. M. Suruki was examined on the Weston Ranch, who stated that Keizo Kamiyama worked for him for two or three months in 1926. He was unable to identify the picture as being Keizo Kamiyama.

2. Haru Suruki, his wife, was likewise unable to identify the picture as representing Keizo Kamiyama.

3. Tonijiro Nishiseki and K. H. Mori, both examined across the road from the Carson Ranch, stated they never knew anyone represented by the picture.

4. S. K. Muramoto and his son, Wataro Muramoto, examined at Perry, California, both identified the picture as being Keizo Kamiyama who had been around there since 1926.

5. K. Nishimoto, examined *ex parte* at San Pedro, identified the picture as being Keizo Kamiyama, who worked for him for two years commencing in 1924.

On page 6 of the regular hearing of December 27, 1928, (Immigration File), Inspector Scott, in identifying these statements, shows the circumstances under which they were taken. He there states:

> "Insp. Those statements were all taken on the dates referred to—22 and 23 of Nov., 1928.
>
> Q. The photograph you used of the alien and referred to in those statements, where did you obtain them; it was taken, was it not, of the alien in this office, by your Service, on or about Nov. 17, 1928? A. It was taken by this Service on or about Nov. 17th.

Q. At the time you took these statements, you didn't have the alien present, did you? A. Did not.

Q. These were all taken within the radius of ten miles from this office; were they not? A. Within the radius of 25 miles of this office.

(Atty's request for copy of Government Exhibit C granted.)

Q. No shorthand reporter was used in taking these statements so you took them in longhand? A. Yes, sir.

Q. You wrote up your own notes? A. Yes, sir."

Inspector Scott further testified at the regular hearing of March 13, 1929, on page 14 (Immigration File):

"When you took the photograph down and exhibited to these parties whose statements you took on Nov. 22 or 23rd, where was this alien who claims to be Keizo Kamiyama?

Scott: Alien was at liberty under bond. He was released under bond at 5:20 P. M., Nov. 20th.

Keating: Why didn't you take the alien himself down and let the witnesses look at the alien instead of using his photograph?

Scott: Because the alien refused to make any statement further in regard to his right to be and remain in the United States until he had conferred with the attorney.

Keating: An attorney. You could easily have located the alien, could you not, had you wanted to?

Scott: I interviewed the alien on the Bunya Ranch and he advised me that you were handling his case and that any further questions regarding him could be taken up with you.

Keating: A smart client."

Thus, the inspector admits that these statements were taken out of the presence of the alien without notifying

the alien or his counsel where or when they were to be taken. The alien was thus deprived of three rights which we respectfully submit deprived him of due process of law, to-wit: *First*, the right to be confronted by the witnesses; *Second*, the right to be notified of the time and place of the hearing; and *Third*, the right to cross-examine the witnesses against him.

Svarney v. U. S. (C. C. A. 8th, 1925), 7 Fed. (2d) 515 at 517;

Ungar v. Seaman (C. C. A. 8th, 1924), 4 Fed. (2d), 80 at 83;

Kwock Jan Fat v. White (1920) 253 U. S. 454, 64 L. Ed. 1010;

In re Chan Foo Lin (C. C. A. 6th), 243 Fed. 137.

Judge Kerrigan in *Ex parte Mouratis* (D. C. N. D. Cal. 1927) 21 Fed. (2d) 694, comments that too often the attitude of the immigration officials appears to be that of the "hanging judges" of the seventeenth century. But we doubt if even those judges acted as their own prosecutor, witnesses and reporter and proceeded to hold court out of the presence of the accused in the fields, without notice to the accused or opportunity to be present.

A case similar in this respect to the case at bar is the case of *Ex parte Bunji Une* (D. C. S. D. Cal. 1930) 41 Fed. (2d) 239. In that case witnesses were shown what purported to be a photograph of the alien in the absence of the alien and his counsel and without notice to either, and their testimony included in the Immigration File. The court very properly released the alien on *habeas corpus*, and said in its opinion, on page 240:

> "Admittedly the examination of four Japanese witnesses was had in the absence of both petitioner and his counsel and without notice to either. This is in violation of part 2, subdivision D of Rule 19, Immigration Rules of January 1, 1930, which requires that, when counsel is selected, he shall be permitted to be present during the conduct of the hearing. Furthermore, identification of petitioner was made by photograph. This, in the judgment of the court, is a questionable proceeding, open to uncertainties, and does not rise to the standard of due process of law to which peitioner, as well as all other inhabitants of the United States, is entitled, and the court is forced to the conclusion that the proceedings on which the order of deportation is based were unfair within the meaning of the law governing them. U. S. v. Sibray (C. C.) 178 F. 150, 151; Maltez v. Nagle (C. C. A.) 27 F. (2d) 835."

Some point will probably be made by respondent that counsel permitted these *ex parte* statements to become part of the record. It is true that counsel did withdraw his objections to the placing of the evidence in the record, but he did not stipulate that it was fair or could be used against the alien. The objections were withdrawn because he felt that the methods of the trial inspector in the case should be in the record so that the Board of Review at Washington and the court, if necessary, could be fully informed as to the methods and practices of the Immigration Service in this case. Even though the inspector had not put this hearsay testimony in the record, still the fact that he in his capacity of judge went out and interviewed *ex parte* witnesses shows he was certainly taking testimony outside of the record and using it against the alien in his findings.

Now, however, we come to the rankest unfairness in the whole case, and which alone entitles Keizo Kamiyama to

his release. On March 13, 1929, the hearing was over and the case closed so far as the introduction of any testimony was concerned. Thereafter the record, in accordance with the rules of the Department of Labor, was forwarded by the San Pedro office of the Immigration Service to Washington for final determination. Here it should be noted that in deportation proceedings the case is not decided by the trial inspector but by the Board of Review (acting for the Secretary of Labor) in Washington. The findings of the trial inspector are only in the nature of recommendations. In this respect, there is a distinction in the procedure before the Department of Labor in deportation cases and in cases wherein an alien is applying for admission to the United States at a port. In deportation proceedings, the action of the Department of Labor at Washington is not sought by appeal as is true in the case of the denial of admission to an alien at a port. Compare section 3 (8 U. S. C. 136) with section 19 (8 U. S. C. 155) of the Immigration Act of 1917.

The case against Keizo Kamiyama was handled throughout by Immigrant Inspector M. H. Scott, who at the conclusion of the hearing (Immigration File page 17), made his findings and recommendation for deportation in the regular way, which findings and recommendation in the ordinary course of procedure should have gone to Washington with the evidence, as the findings and recommendation in the case. However, the inspector in charge of the United States Immigration Service at San Pedro was not satisfied to allow the record to be transmitted solely with these regular findings and recommendation. He decided to make some of his own and to introduce some additional evidence of which the alien had no knowledge or

notice. We ask the court to pay particular attention to the communication dated May 9, 1929, signed by C. G. Gatley, inspector in charge, and addressed to the District Director of the Immigration Service at Los Angeles, California. Then see the red sheet entitled "Transmission of Records of Warrant Hearings," dated May 22, 1929, whereby the Acting District Director of Immigration at Los Angeles forwarded this extraordinary letter and anonymous communication attached thereto of the inspector in charge at San Pedro, to the department at Washington *as part of the record in the case.*

Inspector Gatley in this official document of May 9, 1929, says in part, as follows (Immigration File Letter of May 9, 1929, page 2):

> "In commenting on this case it is desired to state briefly the facts about two cases coming before this office recently which parallel this case in many respects, First, Consider the case of Heishiro Hamaguchi, *Your* file 29270/1683, Bureau file 55657/138. Hamaguchi when apprehended presented an old passport in the name of Yosusuke Hamaguchi claiming some 20 years residence in the United States and that his age was 41 years. With other evidence secured by the arresting officer this office finally *broke* the alien and he admitted that he had secured that passport as a gift from a party unknown and had kept it with the intent of defeating the Immigration Law. That he had entered the United States from Canada in transit to Mexico in 1927 and that he had smuggled back into the United States shortly thereafter. Now we have conclusive information that the rightful owner of the passport died here in this vicinity in 1919. Second, Consider the case of Tokoichi Uyemura, Your file 29270/2519, Bureau file 55665/442. When this alien was taken into custody he presented not less than a hundred letters dated from 1919 to date, together with some insurance policies all in the

> name of Monji Uyemura and he claimed to be that man. Finally the examining inspector *broke* the alien and it developed that Monji Uyemura was a brother of the alien and that the alien had smuggled into the United States about 2 years ago. *The difference in these cases and the case of the subject was that these two aliens broke and told the truth before the warrant of arrest was applied for and that in this case the alien was released under bond before the examining inspector could get the truth about him*, also the alien in this case was from all indications carefully instructed before he was ever arrested." (Italics ours.)

There we find an out and out admission that the purpose of the Immigration Service in arresting Kamiyama without a warrant, holding him incommunicado and secretly questioning him was not for the purpose of adducing legitimate evidence but for the purpose of *"breaking"* the alien. Also the inspector refers to the evidence adduced in two independent cases, tending to show that two other Japanese aliens at some time were in the United States unlawfully and made claims similar to the claims made by Kamiyama, but that these alien *"broke"* and told the truth, and that therefore the Board of Review should look up those two cases and from them determine what the record would show if Kamiyama had only "broken" and told the "truth." The records in the cases referred to were not produced at the hearing, the alien was not confronted with them, nor was he given any opportunity to explain or rebut that evidence or show that the evidence in those two cases was not applicable to his case, or to make any showing whatever in this regard. Certainly it was not fair to try Keizo Kamiyama upon the facts in the cases of Hamaguchi and Uyemura. The files in those two cases are con-

fidential departmental matters and not open to Keizo Kamiyama or his counsel.

But still more flagrant is the use by Inspector Gatley of an anonymous communication received after the hearing had closed and sent to the department at Washington as part of the record for its consideration. Attached to Inspector Gatley's letter of May 9, and referred to in the postscript is the following:

"Los Angeles, Calif.
April 25, 1929.

"Los Angeles Immigration Station of San Pedro, Calif.

Sis:

I am Giving my attention to the Fict that illegally incomed immigrant and whose character are not very willing to have in this country

Who is Located at Venice Calif. Jap Farmhouse BUNYA Ranch Whose Name is (KAMEYAMA. Doubt name) Print Name is (NAKAWATASHI) age about 21: this Person have deceved united States Officers on Landing on deceved He com from Mexico about two year go. immigration Officers can catch quickly He turns Jap celery Ranch Prisen. Give Prompt attention for May escape again.

Very truly

citizen of Los Angeles

Original received San Pedro April 30th, 1929."

Now, it should be borne in mind that the case was closed on March 13, 1929, and that the postscript to Inspector Gatley's letter of May 9 shows that the anonymous letter was not received until April 30, 1929, or six weeks after the conclusion of the hearing. This document was sent on as evidence in the case. It was not shown to the alien,

nor was he allowed or permitted to see it, nor to cross-examine its author. As we have already pointed out, the courts are unanimous in holding that if an alien is deprived of an opportunity to cross-examine the witness or explain or rebut the evidence used against him, the hearing is unfair.

Svarney v. United States (C. C. A. 8th, 1925) 7 Fed. (2d) 515;

Ungar v. Seaman (C. C. A. 8th, 1924) 4 Fed. (2d) 80 at 83;

Ex parte Radivoeff (D. C. Mont., 1922) 278 Fed. 227;

McDonald v. Sin Tak Sam (C. C. A. 8th, 1915), 225 Fed. 710;

Ex parte Jackson (D. C. Mont., 1920) 263 Fed. 110;

Fat v. White (1920) 253 U. S. 454; 64 L. Ed. 1010;

In re Chan Foo Lin (C. C. A. 6th), 243 Fed. 137.

In the case of *Svarney v. United States* (C. C. A. 8th 1925) 7 Fed. (2d) 515, at page 517, it is said:

> "Deportation proceedings are in their nature civil. The rules of evidence need not be followed with the same strictness as in the courts. . . .
>
> "However, even in such administrative proceedings, fundamental and essential rules of evidence and of procedure must be observed. . . . But the more liberal the practice in admitting testimony the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to in-

spect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense.

"The right of cross-examination has long been firmly established in English-speaking countries. Wigmore, in his work on Evidence, says (section 1367): 'For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. . . . If we omit political considerations of broader range, cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure. . . .

". . . Our conclusion is that the affidavit in question was not competent evidence, and ought not to have been received, and that its introduction rendered the hearing unfair. . . ."

More specifically with regard to the use of the anonymous communication, we ask the court to consider the case of *Chew Hoy Quong v. White* (C. C. A. 9th, 1918), 249 Fed. 869, wherein an alien was released from custody upon similar grounds. The court there said on page 870:

"Aside from that, we hold that the fact that the immigration authorities received a confidential communication concerning the applicant's right to admission, upon which they acted, and which was forwarded to the Department of Labor for its consideration, was sufficient to constitute the hearing unfair. However far the hearing on the application of an alien for admission into the United States may depart from what in judicial proceedings is deemed necessary to constitute due process of law, there clearly is no warrant for basing decision, in whole or in part, on confidential communications, the source, motive, or contents of which are not disclosed to the applicant or her counsel, and where no opportunity is

> afforded them to cross-examine, or to offer testimony in rebuttal thereof, or even to know that such communication has been received."

Conclusion.

In conclusion, we desire to reiterate the statement of the court in *Ex parte Tozier* (D. C. Me., 1924), 2 Fed. (2d) 268 at 270:

> "* * * It cannot be too often repeated that administrative tribunals which exercise such tremendous powers over the liberty of persons, without the safeguards which experience had shown are necessary in court proceedings, and which are at once policeman, prosecutor, judge and jury, are bound to a scrupulous regard for the rights of persons affected by their action."

The Immigration File affirmatively establishes that Keizo Kamiyama was in this country more than five years before the institution of the deportation proceedings. There is absolutely no evidence to the contrary, but only vague suspicions, occasioned by certain minor discrepancies in the statement made by Keizo Kamiyama at the unfairly conducted preliminary examination and the failure of certain indiscriminate aliens at *ex parte* examinations to identify a doubtful photograph.

Furthermore, Keizo Kamiyama was not given a fair hearing consistent with the fundamental conception of due process of law. He was arrested without a warrant, confined incommunicado and forced to give a statement to an inspector charged with the duty of "breaking" him. *Ex parte* evidence and statements were taken and considered. Anonymous communications and secret departmental files

in other cases were likewise used against Keizo Kamiyama.

For the reasons herein indicated, the judgment of the court below should be reversed and Keizo Kamiyama discharged from custody.

Respectfully submitted,

J. Edward Keating,
Theodore E. Bowen,
Attorneys for Appellant.

No. 6177.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of
KEIZO KAMIYAMA
For a Writ of Habeas Corpus.

Keizo Kamiyama,
Appellant,

vs.

Walter E. Carr, District Director,
United States Immigration Service,
Appellee.

BRIEF FOR APPELLEE.

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Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This is an appeal from an order discharging a writ of *habeas corpus* and remanding Keizo Kamiyama to the custody of the United States Immigration Service for deportation. [Transcript of Record, page 19.]

The original record of the Department of Labor, Immigration Service, has been filed with the clerk of

this court pursuant to an order of the District Court. [Transcript of Record, page 27.]

Throughout this brief we will refer to this record as the "Immigration File." The printed transcript of the proceeding in the District Court will be referred to as "Transcript of Record."

Keizo Kamiyama, appellant herein, is an alien, a citizen of Japan and of the Japanese race. He will be referred to throughout this brief as the alien. The alien was found by immigration officers near Venice, California, on or about November 16, 1928, without documentary evidence in his possession showing his right to be and remain in the United States. He was conveyed to San Pedro, California, where on the following day he was given a hearing relative to his presence in the United States and on the same date at conclusion of the hearing a telegraphic application for a warrant for the alien's arrest was made to the Secretary of Labor at Washington, D. C. November 17, 1928, fell on Saturday. Telegraphic warrant of arrest issued by the Secretary of Labor was dated the following Monday, to wit: November 19, 1928. The warrant provided for release of the alien under bond. Bond was executed and he was released on November 21, 1928, pending further action in his case. On January 25, 1929, formal hearing under the warrant was instituted at which time the alien was represented by Attorney J. Edward Keating of Los Angeles, California. At that hearing the evidence upon which the warrant of arrest had been issued was presented to the alien and his counsel, at which time certain additional Govern-

ment exhibits were introduced and at which time certain exhibits were introduced in evidence in behalf of the alien. At the conclusion of the hearing of January 25, 1929, the matter was further continued and was resumed on March 13, 1929, that being the time agreed upon by all parties. At conclusion of the continued hearing, it was found by the examining inspector that the alien is a native and citizen of Japan and of the Japanese race, and that he entered the United States from Mexico near Calexico, California, subsequent to July 1, 1924. Upon the evidence submitted the Secretary of Labor caused his warrant to be issued on June 21, 1929, directing return of the alien to Japan on the grounds that he was subject to deportation under section 19 of the Immigration Act of February 5, 1917, being deportable under the provisions of a law of the United States, to wit:

> "The Immigration Act approved May 26, 1924, in that he was not, at the time of his entry, in possession of an unexpired immigration visa; and that he is an alien ineligible to citizenship and not exempted by paragraph (c), section 13 thereof, from the operation of said act."

Appellee was preparing to return the alien to Japan in accordance with the terms of the warrant when *habeas corpus* proceedings were instituted. [Transcript of Record, page 10.] The matter came on for hearing and on the 3rd day of March, 1930, the District Court discharged the writ of *habeas corpus* and remanded the alien to appellee's custody for deportation. [Transcript of Record, page 19.] Thereafter on the 26th day of May, 1930, notice of appeal was filed. [Transcript of Record, page 24.]

ARGUMENT.

It is the contention of appellees that the facts and the law justify the issuance of the above order of deportation. In reaching this conclusion however there are four questions which must be determined. They are:

1. Is this alien Keizo Kamiyama?

2. Has the alien established that he was in the United States prior to July 1, 1924?

3. Was the hearing which resulted in the order of deportation a fair hearing?

4. Is there evidence to sustain the warrant of deportation?

We will discuss these questions in the order stated.

(1) Is This Alien Keizo Kamiyama?

Appellee contends that the alien herein is not Keizo Kamiyama. The evidence indicates that a Japanese alien named Keizo Kamiyama was in the United States prior to July 1, 1924. His residence here may have been legal or at least of such duration that his deportation is no longer possible. Appellee believes that the alien herein knew of this Keizo Kamiyama, by some means secured certain papers belonging to the latter, and assumed the identity of the real Keizo Kamiyama, at least insofar as immigration matters were concerned. Aside from the fact that one or two Japanese have known the alien by the name of Keizo Kamiyama, the only evidence tending to establish that the alien is Keizo Kamiyama is the alien's own testimony; certain letters and other papers bearing the name of Keizo Kamiyama; and the alien's exhibit No. 3: "Japanese Who's Who in

America." With reference to these exhibits filed by the alien he was asked on page 9 of the hearing of January 25, 1929, appearing in the Immigration File whether he could produce any evidence identifying him as the Keizo Kamiyama whose name appeared on the documents in question. The alien replied that he could not. In order therefore to determine whether the exhibits referred to the alien, it is necessary to rely entirely upon the testimony of the alien himself. As far as the letters and receipts are concerned, they contain nothing of descriptive nature to establish that they are in fact the property of this alien and would be of equal value to identify any person in whose hands they might fall who claimed that his name was Keizo Kamiyama. The only exhibit therefore throwing any light upon the identity of the alien is his Exhibit No. 4. The exhibit in question shows that the Keizo Kamiyama therein mentioned was from Hagoshime-ken, Japan (see page 3 of the alien's hearing of January 25, 1929, in Immigration file). On page 1 of the hearing of November 17, 1928, in the same file, the alien claimed under oath and through an interpreter that he was born in Yoshimamura, Wakayana-ken, Japan. Here is a direct conflict. On page 8 of the hearing of January 25, 1929 (see Immigration file), when confronted with this discrepancy the alien attempted to explain this discrepancy and to make it appear that he was in fact born at the place indicated in his Exhibit No. 4. Appellee contends that this explanation is untenable.

Another discrepancy between the testimony of the alien and his Exhibit No. 4 is concerning the alien's age. The exhibit indicates that the Keizo Kamiyama therein

mentioned was born August 8th, Meiji 27 (1894). On January 25, 1929, when the alien made his statement, the real Keizo Kamiyama would have been about 35½ years old. On page 1 of the alien's hearing of November 17, 1928, he testified under oath through an interpreter that he was 37 years old. Twice he reiterated that statement. The record of that hearing indicates that the alien was uncertain whether he was born in the Japanese year Meiji 28 (1895) or Meiji 25 (1892), but there was no uncertainty about his age being 37 years. When in his hearing of January 25, 1929, he was confronted with this discrepancy (see testimony of pages 8 and 9 in Immigration File), the alien admitted that he was 25 years old Japanese reckoning and 24 years old by American reckoning, and that he was born in the Japanese year Meiji 37 (1904) thus making him about 10 years younger than the age of the Keizo Kamiyama mentioned in the aliens' Exhibit No. 4. Appellee believes that the age of the Keizo Kamiyama mentioned in said Exhibit No. 4 is correct and in support of this theory refers to the testimony in Government's Exhibit "C" in Immigration File comprising the testimony of M. Suruki given under date of November 23, 1928. In that testimony the witness stated that the Kamiyama he knew was "about 32 or 33 years old." We refer also to the testimony of Mrs. M. Suruki appearing on page 2 of statement of November 23, 1928, in Immigration File, which is part of Government Exhibit "C." In that statement the witness testified that Keizo Kamiyama was "32 to 35 years." On November 23, 1928, witness K. Nishamoto testified (page 5 Government said Exhibit "C") that the Kamiyama he

knew was "over 35 years he was older than I." The testimony of the above witnesses as to the apparent age of Keizo Kamiyama supports the evidence appearing in the alien's Exhibit No. 3 that the Keizo Kamiyama therein mentioned was in fact more than 35 years of age. In giving his present testimony that he is only 24 years of age the alien is compelled to impeach the evidentiary value of his own exhibit and thus is left without any documentary evidence tending to establish his identity.

It is further noted from page 5 of the hearing of January 25, 1929, in Immigration File, that the alien never registered with the Japanese consul during all the years of his alleged residence in and around Los Angeles. If the alien actually entered the United States on February 13, 1920, and has resided here ever since that date; if he is well enough known to be mentioned in the Japanese "Who's who in America," he should be able to produce many witnesses to testify that they had known him here. The absence of such testimony, and the discrepancies as to place of origin and time of birth, discredit the alien's claim that he is the Keizo Kamiyama who resided in the United States prior to July 1, 1924.

(2) Has the Alien Established That He Was In the United States Prior to July 1, 1924?

Appellee contends that no proof that this alien was in the United States prior to July 1, 1924, has been offered. In his hearing of November 17, 1928, on page 1 thereof (see Immigration File) the alien testified that in May, 1919, he proceeded from Japan to Mexico on

the ss. "Siberia Maru." When advised in that hearing that the local agents of the steamship in question and the Immigration Service records indicated that the "Siberia Maru" did not go to Mexico in 1919, the alien said "I am telling the truth." At the hearing of January 25, 1929 (page 4 in said file) the Government introduced into evidence a letter from the NYK steamship line dated November 30, 1929, indicating that the vessel in question had not visited Mexico in 1919. Counsel for the alien made no objection to the introduction of this evidence which refuted the claim of the alien. From this it is seen that the alien did not enter Mexico on the vessel claimed by him and discredits his testimony as to such entry.

Another feature that raises a doubt as to length of residence of the alien in the United States is this: His testimony on page 5 of his hearing of January 25, 1929 (Immigration File), indicates that he is 24 years old American reckoning. He claims to have left Japan in 1919 for Mexico. (See page 1 of the alien's statement of November 17, 1928 in Immigration File.) That would make him about 14 years old at the time he left Japan for Mexico. On page 11 of the hearing of January 25, 1925, the alien testified "I have no brother." Therefore, the alien is the only son of his father and mother, who, according to testimony on page 1 of the hearing of November 17, 1928, still reside in Yoshi Namura, Wakayana, Japan. While it is possible, yet it hardly seems probable, that parents would permit an only son of such tender years to leave his home and proceed half way around the world to a foreign land, the language of which he could not speak and with the conditions of which he

could not have been familiar. The proven fact that the alien did not reach Mexico on the ship that he swore conveyed him there and the improbable story of his arrival in Mexico when about 14 years of age discredits his testimony concerning his arrival there and throws grave doubt upon the truth of his statement that he entered the United States from Mexico in 1920.

To escape deportation the alien must show that he entered the United States prior to July 1, 1924. Section 31 (c) of the Immigration Act of 1924 (43 Stat. 153) provides:

> "If an alien arrived in the United States before July 1, 1924, his right to admission shall be determined without regard to the provisions of this act except section 23."

Section 23 of the Act provides in part:

> "* * * in any deportation proceeding against any alien the burden of proof shall be upon such alien to show that he entered the United States lawfully and the time, place, and manner of such entry into the United States, but in presenting such proof he shall be entltled to the production of his immigration visa, if any, or of other documents concerning such entry, in the custody of the Department of Labor."

The alien herein admits unlawful entry into the United States and manifestly, therefore, he cannot show lawful entry; but inasmuch as he claims entry prior to July 1, 1924, under the section above cited, the burden still rests upon him to show that he did in fact enter the United States prior to that date. Failing in this he has

not met the burden of proof placed upon him by section 23, and the presumption is that he entered this country subsequent to July 1, 1924.

Section 14 of the Immigration Act of 1924 provides in part as follows:

> "any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this act to enter the United States * * * shall be taken into custody and deported in the same manner as provided for in sections 19 and 20 of the Immigration Act of 1917."

In enacting the above section we must assume that Congress was cognizant of the fact that with the removal of the time limit within which deportation must be carried out as to persons entering the United States subsequent to July 1, 1924, some aliens unquestionably would claim that they entered the United States prior to the effective date of the section in question. Consequently section 23 of the Act, *supra,* places squarely upon the alien whose deportation is sought the burden of showing that he entered the United States prior to July 1, 1924. The use of the words "except section 23" as they appear in section 31 (c) of the Act of 1924, clearly indicates the intent of Congress.

It is appellee's contention that the alien has not established that he was in this country prior to July 1, 1924, and in view of that fact appellee believes this appeal should be dismissed and appellant remanded for deportation provided, of course, the hearing which resulted in the order of deportation was fair.

(3) Was the Hearing Which Resulted In the Order of Deportation a Fair Hearing?

It is appellee's contention that the hearing which resulted in the order of deportation was fair. While the alien was not represented by Counsel at the preliminary hearing of November 17, 1928, he was represented by counsel at subsequent hearings and associate counsel appeared before the board of review in Washington in behalf of the alien. The mere fact that an alien is not represented by counsel in a preliminary examination does not constitute unfairness, if it appears that before the record is transmitted to the Secretary of Labor for decision the alien is represented by counsel. (See Plane v. Carr C. C. A. 9th Circuit 19 Fed. (2nd) 470, and *Ex Parte* Ematsu Kishimoto C. C. A. 9th circuit 32 Fed. (2nd) 991.) In the conduct of the hearing in the case at bar the rules of the Department of Labor were followed and it is believed an examination of the record will indicate that fairness prevailed throughout the entire proceeding.

(4) Is There Evidence to Sustain the Warrant of Deportation?

Appellee contends that there is sufficient evidence to sustain the deportation order in this case. The warrant of deportation charges that the alien "was not, at the time of his entry, in possession of an unexpired immigration visa." No immigration visa has been produced nor can one be produced in view of the fact that the alien herein admits entering the United States without inspection. It is apparent therefore that this specific charge is supported by the record.

The next charge is that the alien "is an alien ineligible to citizenship." He is of the Japanese race and is therefore ineligible to citizenship (*Takeo Ozawa v. U. S.*, 43 U. S. 65). The evidence therefore supports this particular charge appearing in the warrant.

The remaining charge in the warrant is that the alien was not exempted from the operation of the Immigration Act of 1924 by the terms of paragraph C, section 13 thereof. The section referred to provides that aliens ineligible to citizenship shall not be admitted to the United States unless they are members of certain classes of aliens specifically exempted. The alien herein at the time of entry was not a member of these classes specifically exempted. It follows therefore, that he is unlawfully in the United States under this third ground mentioned in the warrant.

The above grounds of deportation of course are predicated upon the fact that the alien entered the United States subsequent to July 1, 1924. As pointed out, *supra*, the alien has failed to show that he entered the United States prior to July 1, 1924, and having failed to show that his entry was before the date in question, appellee contends that the various grounds set forth in the warrant of deportation have been sustained.

REPLY TO PETITIONER'S BRIEF.

Counsel refers to two reasons why the Secretary of Labor had no authority to issue a warrant for appellant's deportation. We enumerate them and will refer to them in the order stated.

1. Counsel Contends That There Is No Evidence to Sustain the Warrant of Deportation.

In reply to this contention this Honorable Court's attention is respectfully directed to paragraph 4 of our argument as above set forth. Appellee therein has stated why in his opinion the three grounds for deportation as set forth in the warrant of deportation have been sustained.

Under the above heading counsel has expressed the belief that appellee will concede that if the alien in this case has resided in the United States for a period in excess of five years before institution of deportation proceedings that the period within which deportation may be effected has terminated. While in most cases the five-year limitation prevails as to aliens who can establish that they entered the United States prior to July 1, 1924, the limitation has no application to aliens who enter this country subsequent to July 1, 1924. Section 14 of the Act of 1924 above quoted testimony provides that any alien who enters the United States *at any time* after the passage of the act in question and who is thereafter found to have been at the time of entry not entitled under the act to enter the United States shall be taken into custody and deported. Having entered the United States since July 1, 1924, without an immigration visa, being an alien ineligible to citizenship at the time of his entry, and not being exempt under the paragraph of 13 (c) of the act, there is no time limit fixed within which the alien must be deported. Consequently the five-year limit referred to by counsel has no application to this alien's case.

Counsel contends, on page 7 of his brief, that the Immigration Service did not produce one word of testimony

or any other kind of evidence to dispute the alien's claim that he last entered the United States in February, 1920. In paragraph 2 of the argument appellee has pointed out why in his opinion the burden of showing that the alien entered the United States prior to July 1, 1924, is by law placed upon the alien. Appellee contends that the alien has not sustained the burden of proof required and contends further, as set forth in paragraph numbered 1 of the argument, why in his opinion the alien in the case at bar is not the Keizo Kamiyama referred to in the various exhibits filed by the alien as listed on pages 7 and 8 of counsel's brief.

On page 8 of his brief, counsel refers to the testimony of K. Nishimoto, which he contends corroborates the alien's testimony to residence in the United States prior to July 1, 1924. In the Immigration File will be found Exhibit "C," which consists of a photograph of the alien in the case at bar and certain testimony given relative to Keizo Kamiyama. On page 5 of Exhibit "C" will be found testimony of witness K. Nishimoto given November 23, 1928. On page 15 of the Immigration File will be found testimony given by this same witness on March 13, 1929, when he testified in behalf of the alien. It will be noted from Nishimoto's testimony of November 23, 1928, that the Keizo Kamiyama mentioned by witness was over 35 years of age. The witness Nishimoto was then 30 years old and he distinctly points out that the Keizo Kamiyama concerning whom he was then testifying was "older than I." On pages 8 and 9 of the Immigration File will be found the alien's testimony wherein he claims that he was at that time 24 years old, American reckoning, having been born in 1904. It will be noted further (see page 15

of Nishimoto's testimony appearing in Immigration File on March 13, 1929) that when the inspector asked witness this question with reference to the alien, "Is his name Keizo Kamiyama?" witness replied: "I think so." This attempt of the witness Nishimoto to identify the 24-year-old alien as the Keizo Kamiyama who had previously worked for him and was over 35 years of age, in the opinion of appellee, discredits the testimony of Nishimoto as to the real identity of the alien. Counsel contends, with reference to this so-called "positive testimony," that the Immigration Service cannot chose to disregard it where there is nothing to refute it and cites *U. S. Ex Rel Schachter v. Curran*, 4 Fed. (2d) 356. The question involved in that case was whether the alien had resided in South America for at least five years immediately preceding the time of his application for admission to the United States. If he had, under the Act of May 19, 1921, he was exempt from quota requirements. He was excluded at New York on the ground that he had come to the United States in excess of the Russian quota. No consideration was given by the excluding board to the question of the alien's residence in South America. In other words, the sole ground on which the alien claimed the right to enter the United States was ignored. On *habeas corpus* the District Court returned the case to the board that it might fully and completely set forth its determination upon the question of the alien's residence in South America for five years prior to his arrival in the United States and to whether the alien was entitled to consideration under the exception accorded aliens for a five-year residence in South America. The case was reopened by the board as it stated for the "correction of the record." Without further testimony the

board held it was "not satisfied from the evidence submitted that the alien had resided in Argentine for five years prior to his application for admission to the United States" and excluded him. The Circuit Court held, in sustaining *habeas corpus:*

> "There is nothing in the evidence to impeach the testimony of the alien to the effect that he had lived in La Plata continuously five years before leaving for the United States. The documentary evidence upon which he secured the visa of his passport was apparently not considered at all."

This documentary evidence was accessible to the board and the board chose to disregard it. The cited case differs materially from the case at bar. In the cited case no effort was made at the reopening to secure documentary or other evidence of the fact that the alien had lived in South America for five years. In that case the available evidence was disregarded. In the case at bar, however, there is something in the evidence to *impeach* the testimony given not only by the alien but by his witness Nishimoto. It is not a question of disregarding testimony and evidence. The immigration authorities simply did not believe the testimony nor did they believe the documentary exhibits referred to by the alien. We know of no rule which requires that the administrative authorities must believe all testimony presented to them in a case of this kind. On page 9 of his brief, counsel refers to certain discrepancies which he considers trivial. These discrepancies, appellee contends, are material as they refer to the question of the identity of the alien and as to this the age of the alien is certainly very material. While it is true the preliminary hearing accorded the alien on November 18, 1928, was

not made in the presence of counsel, that does not render the hearing unfair (*Chin Shee v. White*, 273 Fed. 801; *Plane v. Carr*, 19 Fed. (2d) 470, and *ex parte Kishimoto*, 32 Fed. (2d) 991, all of which cases were decided by CCA 9th.)

For the foregoing reasons it is believed that counsel's first contention that there is no evidence to sustain the warrant of deportation is untenable.

2. Counsel Contends That the Alien Was Not Given a Fair Hearing.

Counsel points out four reasons why he considers the hearing unfair. We will discuss these reasons numerically.

First: He was arrested without a warrant and interrogated while confined incommunicado and without bail. In our statement of facts we have recited the circumstances surrounding the arrest of the alien. While recognizing the right of the government to arrest and deport aliens under certain conditions, yet counsel contends, on pages 11, 12 and 13 of his brief, that there is nothing in the Immigration Act or in the Department of Labor Rules authorizing an immigrant inspector to take an alien into custody without warrant. Counsel cites the Act of February 27, 1925 (8 U. S. C. 110) as limiting the power of employees of the Bureau of Immigration to arrest aliens without warrant as to those cases where the alien is seen in the act of surreptitiously entering the United States. The primary purpose of the act referred to was to confer upon members of the recently organized border patrol the right to take aliens into custody. For years prior to that date the right of regularly appointed immigrant inspectors to take aliens into custody without warrant, when

said inspectors had reason to believe such aliens were unlawfully within the United States, seems not to have been seriously questioned. Subdivision F of Rule 27 was promulgated subsequent to the passage of the Act of February 27, 1925. Paragraph 3 of that rule reads as follows:

> "Wherever there is any likelihood that an alien who has succeeded in effecting unlawful entry will leave for parts unknown before a formal warrant of arrest can be obtained, request for the issuance of a warrant should be made by telegraph, using the departmental code for the purpose; and immediately upon receipt of such telegraphic warrant, examination of said alien thereunder as to his right to be and remain in the United States shall be proceeded with as provided in Sub-Division D of Rule 18."

Clearly the rule contemplates holding in custody any alien apprehended after unlawful entry until formal warrant of arrest is received where there is likelihood that the alien will leave for parts unknown. In the case at bar the alien admitted unlawful entry and if he had not been held by the inspector, there was every reason for the inspector to believe that the alien would depart for parts unknown. A similar issue regarding the question of arrest was raised by counsel in the case of *Ex parte Ematsu Kishimoto,* 32 Fed. (2d) 991, decided by this Honorable Court.

Counsel refers to *Bilokumsky v. Tod*, 263 U. S. 149, on page 14 of his brief and infers therefrom that taking a statement from an alien unlawfully held is tantamount to unlawful search and seizure. Appellee contends that under the circumstances of appellant's case, he was lawfully held for he admitted entry without inspection, and at no place in the record subsequently made is it contended

by appellant that his entry into the United States was lawful.

Counsel cites on page 14 of his brief the case of *Charley Hee v. U. S.*, 19 Fed. (2d) 335, which cannot be construed, appellee believes, as authority for considering appellant's statement of May 17, 1928, as having been unlawfully secured. The Charley Hee case was a judicial proceeding. The distinction between a judicial and an administrative proceeding is clearly set forth in *Lew Guy v. Tillinghast* 24 Fed. (2d) 825. Lew Guy and certain other Chinese aliens were apprehended July 30, 1927, and preliminary statements were immediately taken from them. On August 2, 1927, warrants of arrest were issued by the Secretary of Labor and hearings held under authority of such warrants. At those hearings, over objection of the attorney representing the Chinese aliens, their preliminary statements were read to them and made a part of the record. In denying their petitions for writs of *habeas corpus* the court held:

> "The authority to deport these aliens, pursuant to Section 19 of the Immigration Act of February 5, 1917, * * * cannot be questioned. Ng Fung Ho vs. White, 259 U. S. 276. * * * All decisive questions involved in these proceedings are disposed of in Ng Fung Ho vs. White, *supra*. It is intimated that the government has accepted as good law the dissenting opinion of Judge Anderson in Charles Hee vs. U. S., 19 Fed. (2d) 335, and that therefore the use of the preliminary statement at the administrative hearing upon the deportation warrant offers grounds for declaring the hearing unfair. With this contention I cannot agree. Judge Anderson was dealing with judicial proceedings and not executive proceed-

> ings and it has recently been held in this Court that administrative officials are not bound by strict rules of evidence. Johnson v. Kock Tung, (CCA) 3 Fed. (2d) 889; Moy Said Ching vs. Tillinghast, (CCA) 21 Fed. (2) 810."

The case of appellant herein is fundamentally identical with the Lew Guy case and appellee respectfully contends that the statement of November 17 1928, should not be considered as unlawfully secured. (See, also, *Chan Wong v. Nagle*, (CCA 9) 17 Fed. 2, 987.)

Second: Evidence was received outside the trial and outside the presence of the accused and without notifying him or his counsel. Under this heading counsel refers to the Japanese photograph and testimony filed in the Immigration record as Exhibit "C." The testimony incorporated in Exhibit "C" was secured when neither counsel or appellant were present. On page 6 of the hearing of January 25, 1929, (see Immigration File) when an attempt was made on the part of the examining inspector to introduce Government Exhibit "C" counsel objected on the ground that the testimony was hearsay and its introduction was in violation of his client's constitutional rights. After this objection was interposed the hearing was adjourned until 2:55 p. m. this date. If this Honorable Court will refer to page 6 of the above hearing of January 25, 1929, it will be seen that counsel withdrew his objection and Government Exhibit "C" and the photograph and transcript of testimony were permitted to remain in the record without further objection. Moreover, at the hearing of January 25, 1929, appellant was not denied the right to cross-examine the witness whose testimony appears in Government Exhibit "C." Appellant

called one of these witnesses himself, to-wit: K. Nishimoto. Appellee would have been compelled to subpoena the other witnesses whose testimony appears in Government Exhibit "C" if appellant had requested that those witnesses be present in order that counsel might cross-examine them. However, in view of the fact that counsel withdrew his objection to the introduction of Exhibit "C" appellee contends that counsel cannot at this time consistently urge that it was unfair to permit the introduction of the exhibits in question. On page 21 of his brief, counsel cites certain cases which hold that an alien has a right to be confronted with the witnesses against him; has a right to be notified of the time and place of hearing and has a right to cross-examine witnesses who appear in behalf of the government. We do not dispute the correctness of those cases and if the government had refused to accord the alien these rights there might be some just ground for his contention that the hearing was unfair. However, the introduction into evidence of statements made by witnesses who are not thereafter produced for cross-examination does not necessarily render the proceeding invalid if the alien is given a full opportunity to rebut this evidence produced against him. That theory is clearly set forth in the decision by this Honorable Court in the case of *Yip Wah v. Nagle*, 7 Fed. (2d) 426. Of course, it is well established that the rules of evidence and of procedure applicable in judicial proceedings need not be strictly followed in deportation cases nor is the hearing invalid because some evidence has been improperly rejected on receipt. *U. S. Ex rel Bilokumpsky v. Tod*, 263 U. S. 149, 157.

Counsel refers, on page 21 of his brief, to the case of *Ex parte Bunji Une*, 41 Fed. (2d) 239, with reference to the presentation of a photograph to the various witnesses and having them attempt to identify the alien from that photograph. As to this allegation it is to be noted that the photograph complained of in the case at bar is an integral part of Government's Exhibit "C" and objection to the introduction of this exhibit was withdrawn by counsel. The entire exhibit was properly in evidence, therefore, and the explanation as to counsel's motive for withdrawing his objection to the introduction of Exhibit "C" (see page 22 of counsel's brief) is not entitled to serious consideration.

Third: Records and testimony taken in other cases were used against the alien without giving him the opportunity to cross-examine the witnesses therein or to explain or rebut their testimony.

Under this heading counsel discusses a certain letter dated May 9, 1929, and written by Inspector in Charge C. G. Gatley of the San Pedro Immigration Office. (This letter is incorporated in the Immigration File.) In that letter the inspector in charge reviewed the testimony and made comment upon certain other cases involving Japanese aliens in deportation proceedings. As a letter of transmittal it became a part of the record in this case, but is no more to be considered as evidence against the appellant herein than a brief would be considered as evidence. It does not purport to be evidence and its introduction into the record should be in no way construed as unfair to this appellant. At the conclusion of the letter in question the inspector in charge recommended the alien's deportation.

He had a right to make such a recommendation despite the recommendation of M. H. Scott, the examining inspector. Immigration Rule 18, paragraph 5, subdivision D of the Immigration Rules of March 1, 1927, which were in effect when the hearing against the alien was held, distinctly provide that the officer in charge shall recommend to the Secretary of Labor whether or not a warrant of deportation shall issue. It is felt, therefore, that the letter complained of should not be held as unfair to the alien.

Fourth: Anonymous communications were considered in evidence without giving the alien the opportunity of seeing, explaining or rebutting them.

While anonymous communications are referred to on page 10 of counsel's brief, and on page 26 thereof, but one such anonymous communication is complained of and that is printed in its entirety on page 26 of counsel's brief. The communication complained of was transmitted to appellee by the inspector in charge at San Pedro under cover of the latter's letter of May 9, 1929. It will be noted that this anonymous letter was dated April 25, 1925, and was not received by the San Pedro Immigration Office until April 30, 1929, which was after final hearing of the appellant had been concluded, for it will be noted (see page 17 of the hearing in the Immigration File) that the testimony was closed and the examining inspector's recommendation was made on March 13, 1929. It cannot be contended, therefore, that the anonymous letter of April 25 in any way influenced the recommendation of the examining inspector, nor may it be urged successfully that the communication in any way influenced the finding of

the Board of Review in Washington. There is nothing in the finding of the board to indicate that it in any way considered the letter complained of. Had the letter contained independent grounds for deportation and had such grounds been relied upon, there would be justification for the charge of unfairness. But the letter contained data which had been developed already during the examination of the appellant and at most did nothing more than corroborate facts developed during the hearing. This case differs from that of *Chew Hoy Quong v. White*, (CCA 9th, 1918) 247 Fed. 869, cited by counsel on page 28 of his brief. The report in that case indicates that certain confidential information contained in a confidential communication was forwarded to the Secretary of Labor to be considered by him on appeal. Apparently the communication was considered by the Secretary of Labor in reaching his decision in the matter. For the reason that nothing in the letter apparently affected the decision of the Board of Review, it is the belief of appellee that the case at bar is not on all fours with *Chew Hoy Quong v. White*. The case at bar is similar to that of *Ghiggeri v. Nagle*, decided by this Honorable Court and reported in 19 Fed. (2d) 875. In that case a letter from a police officer in San Francisco was received in evidence in a deportation proceeding, but apparently was not considered by the Board of Review in Washington or by the Secretary of Labor, nor did it affect their decision in that case. This Honorable Court held:

> "It is well settled that a warrant of deportation is not necessarily rendered void by the reception of incompetent evidence." U. S. v. Tod, 263 U. S. 149, 157; Tong Tun v. Edsell, 223 U. S. 673, 681; U. S. v. Curran, CCA 12 Fed. (2d) 636.

In view of the circumstances involved and of the decisions just cited, we make no special reference to the cases cited by counsel on page 27 of his brief.

Conclusion.

Appellee respectfully contends that this appeal should be dismissed and that appellant should be remanded for deportation for the reasons that:

1. The alien herein is not the Keizo Kamiyama who was domiciled in the United States prior to July 1, 1924.

2. The alien has not shown that he resided in the United States prior to July 1, 1924, and under the law it is presumed he entered subsequent to that date.

3. That the warrant hearing resulting in the order of deportation was a fair hearing.

4. That the evidence sustains the warrant of deportation.

Respectfully submitted,

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6177

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of
KEIZO KAMIYAMA,
For a Writ of Habeas Corpus.

Keizo Kamiyama,
Appellant,
vs.
Walter E. Carr, District Director, United States Immigration Service,
Appellee.

PETITION FOR REHEARING.

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Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

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vs.

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Appellee.

PETITION FOR REHEARING.

To the Honorable United States Circuit Court of Appeals for the Ninth Circuit, and to the Judges Thereof:

Comes now Keizo Kamiyama, the appellant in the above entitled cause, and presents this his petition for a rehearing of the above entitled cause, and in support thereof, respectfully shows:

I.

This Honorable Court having decided the appeal chiefly upon a point not raised by the appellee and argued in the briefs or orally by counsel on either side, petitioner respectfully asks that a rehearing and reargument thereof

be granted. In this regard, petitioner is mindful of the rule of the court (Rule 29) and applicable decisions to the effect that in a petition for rehearing the points should be set forth briefly. For that reason, petitioner will be as brief as possible but the matter cannot be presented without considerable elucidation.

This Honorable Court based its opinion mainly upon the purported failure of counsel to make a reviewable record in the Department of Labor by failing to note and urge objections and exceptions. Many cases involving judicial trials were cited in support of this ruling. (Opinion, p. 3.) Petitioner respectfully contends that by so holding, this court has departed from the long recognized principle that deportation proceedings are informal in nature and are not governed by the rules of evidence and procedure applicable to judicial trials.

Bilokumsky v. Todd, 263 U. S. 149, 157, 44 S. Ct. 54, 68 L. Ed. 221;

U. S. ex rel. Fink v. Todd (C. C. A. 2nd, 1924), 1 Fed. (2d) 246, 248 (reversed on other grounds, 69 L. Ed. 793);

Johnson v. Kock Shing (C. C. A. 1st, 1924), 3 Fed. (2d) 889;

Jung See v. Nash (C. C. A. 8th, 1925), 4 Fed. (2d) 639, 643;

Yip Wah v. Nagle (C. C. A. 9th, 1925), 7 Fed. (2d) 426, 427;

U. S. ex rel. Smith v. Curran (C. C. A. 2nd, 1926), 12 Fed. (2d) 636, 637, 638;

Seif v. Nagle (C. C. A. 9th, 1926), 14 Fed. (2d) 416;

U. S. v. Brough (C. C. A. 2nd, 1926), 15 Fed. (2d) 377, 379;

Kostenowczyk v. Nagle (C. C. A. 9th, 1927), 18 Fed. (2d) 834, 835;

Moy Said Ching v. Tillinghast (C. C. A. 1st, 1927), 21 Fed. (2d) 810, 811;

U. S. v. Flynn (D. C. W. D. N. Y., 1927), 22 Fed. (2d) 174, 176;

Mason v. Tillinghast (C. C. A. 1st, 1928), 27 Fed. (2d) 580;

Gung You v. Nagle (C. C. A. 9th, 1929), 34 Fed. (2d) 848, 852;

In re Sugano (D. C. S. D. Cal., 1930), 40 Fed. (2d) 961.

The following short quotations demonstrate petitioner's contention in this regard:

Bilokumsky v. Todd, 263 U. S. 149, 157, 44 S. Ct. 54, 68 L. Ed. 221:

"A hearing granted does not cease to be fair merely because rules of evidence and of procedure applicable in judicial proceedings have not been strictly followed by the executive, or because some evidence has been improperly rejected or received."

Weinbrand v. Prentis (C. C. A. 6th, 1925), 4 Fed. (2d) 778, 779:

"It is well settled that proceedings for the deportation of an alien under the immigration statutes may be summary, and are in no sense a trial for a crime or offense, nor governed by the rules of such trials as to pleadings and evidence; * * *"

Ex parte Keizo Shibata (D. C. S. D. Cal., 1929), 30 Fed. (2d) 942, 945 (reversed on other grounds, ... Fed. .....):

"The Labor Department and its boards of inspection are not bound by strict requirements of court

procedure, neither in the statement of the charge, nor in the mode of proving it."

Not only has the rule contended been applied by the Supreme Court of the United States in *Bilokumsky v. Todd, supra*, but heretofore it has been the ruling and holding of this court as will be shown from the following quotations:

Lew Shee v. Nagle (C. C. A. 9th, 1925), 7 Fed. (2) 367, 368:

"'Such departmental proceedings are not judicial, and a *quasi* appellate review by a court does not make them so.'"

Ghiggeri v. Nagle (C. C. A. 9th, 1927), 19 Fed. (2d) 875, at page 876:

"Having in mind the settled doctrine that in such cases the strict rules of judicial procedure and of proofs do not prevail, we * * *"

Weedin v. Mon Hin (C. C. A. 9th, 1925), 4 Fed. (2d) 533:

"In disposing of the question of the appellee's right to enter the United States we are not confined to a consideration of the grounds on which he was excluded by the local authorities; we may properly advert to other grounds on which as a matter of law that conclusion would follow."

Petitioner urges the learned judge in this court's opinion, by citing authorities applicable to judicial trials, has made the error made by the appellant in *Hom Moon Ong v. Nagle* (C. C. A. 9th, 1929), 32 Fed. (2d) 470, where this court formerly said (page 472):

"The appellant attempts to assimilate the rules governing the functions of a board of special inquiry to those which apply to a court, and cites

> authorities to the proposition that, where a court consists of several judges, the absence of one will work its disorganization, and that a disposition of a case by a court organized in violation of statutory provisions must be held null and void. But, a board of special inquiry is but an instrument of the executive power, and is not a court, and the proceedings to determine the right of a foreign born person, claiming citizenship, to enter the United States, are administrative and not judicial, nor are the members of the board judicial officers."

Is it to be concluded that strict rules of evidence and procedure are not binding on the prosecution but only on the accused?

The grossest unfairness complained of by petitioner consisted of the anonymous communication sent as part of the record from the San Pedro immigration office to Washington, and the reference to other "untruthful" Japanese cases *in the inter-departmental communication from Inspector Gatley to the bureau at Washington.* This Honorable Court is familiar with the fact that counsel are discouraged from making objections in the records of the immigration hearings. Petitioner feels that the court, in taking the position it has taken in the instant case, has receded from the position taken by it in *Maltez v. Nagle* (C. C. A. 9th, 1928), 27 Fed. (2d) 835, 837:

> "Moreover, were it conceded that no formal demand for an opportunity to cross-examine was expressly made at the hearing, we do not think the concession would purge the proceedings of all unfairness. Admittedly appellant objected to the consideration of these statements, and under some general rule of practice before the inspector the alien is discouraged from particularizing his objections or stating the reasons therefor. Counsel for appellant was so admonished again and again in this case. * * *

> "The interests of truth clearly demanded cross-examination, and it should have been invited, not evaded."

The use of *ex parte* communications was recognized as the grossest kind of unfairness in *Swarney v. U. S.*, 7 Fed. (2d), 515, wherein the Circuit Court of Appeals for the Eighth Circuit, said on page 518:

> "*It is contended that the defendant made no objection to the introduction of the affidavit before the inspector and therefore cannot now complain.* It is our understanding that a rule of the department in effect at the time of the hearing provided that 'objections and exceptions of counsel should not be entered on the record but might be presented in accompanying brief.' But, however that may be, we are not inclined to apply strictly the rule as to objections and exceptions in a case where the quasi tribunal itself introduces its own evidence. Our conclusion is that the affidavit in question was not competent evidence, and ought not to have been received, and that its introduction rendered the hearing unfair." (Italics ours.)

On page 5 of this Honorable Court's opinion in the instant case, it is said:

> "It has frequently been held that the Immigration authorities are entitled to take notice of all their records. Lee Chun v. Nagle, 35 Fed. (2d) 839."

We have no quarrel with the proposition that in Chinese cases, where the question of relationship is before a board of special inquiry, that the inconsistent statements of the claimed father and other relations made previously at other hearings could be put in evidence and considered. Such is the holding in *Lee Chun v. Nagle*, *supra*, and is as far as any decided case goes. But that is not the situation in the case at bar. In this case, *after the trial was*

over and the case was closed in so far as the introduction of any further testimony was concerned, either by the alien or by the government, *the Inspector in Charge* at San Pedro, not the authorized trial officer, but a stranger to the case, in a communication dated May 9, 1929, asked the Board of Review to consider the records in two other *independent* Japanese cases as tending to show that because those Japanese lied about a similar situation therefore Keizo Kamiyama should now be considered untruthful. *Those files were not put in evidence* and were not furnished nor available to counsel or the alien. The consideration of such extraneous matter was therefore the most flagrant sort of unfairness. No decided case supports it. On the contrary the case of *Mew ex rel Keung v. Tillinghast* (C. C. A. 1st, 1929) 30 Fed. (2d) 684, held that where a board of special inquiry took extraneous matter into consideration, it rendered the hearing unfair. The case does not expressly say but it must be implied from the opinion that the extraneous matter considered consisted of independent records, not put in evidence at the hearing.

The use of the anonymous communication cannot in our minds be excused by *the technical failure of counsel* to make a *formal* objection in the record of the administrative tribunal. In the case of *Ungar v. Seaman,* 4 Fed. (2d) 80, the Circuit Court of Appeals for the Eighth Circuit said at page 84:

> "The introduction and receipt by the Assistant Secretary of Labor, *after the hearing was closed, without notice to or knowledge of the accused,* of the hearsay statements of the immigration inspector to the effect that the alien was keeping quiet, but that if the warrant proceeding should be canceled he

> would resume his former activities, and that, according to a newspaper report, he was one of a committee of seven to report at a protest meeting against the decision of a court that certain strikers were in contempt of its order, was grossly unfair and unjust. The facts that the Assistant Secretary of Labor called for and caused this evidence to be procured after the hearing of the alien had been concluded in January, 1920, and that seven days after the last of this evidence was reported to him on December 3, 1920, he rendered his decision against the accused leaves little doubt that this later evidence seriously affected his decision. Its receipt and consideration violated the indispensable condition of a fair hearing of a litigated issue that the case shall be decided on the evidence at the hearing, when parties or their counsel were present and that neither party nor court or quasi judicial tribunal shall subsequently receive evidence without notice to the party to be affected or their counsel and time and opportunity to rebut it." (Italics ours.)

The inspector in charge at San Pedro did exactly as prohibited in *Ungar v. Seaman.* He, "after the hearing was closed, without notice to or knowledge of the accused" put his own statements of fact into the record. The statements so put in are not only unfair but false as hereinafter shown.

Before passing from this point, it might be well to note that the Board of Review in Washington, who made the findings and final decision in this case (Decision of June 18, 1929) *has no legal existence whatever.* We submit that *in holding the alien down to strict rules of procedure* by making a record before the Board of Review, the nature of the Board of Review has been confused with the nature of certain quasi judicial governmental boards. For instance, the Interstate Commerce Commis-

sion, the Board of Tax Appeals, the Board of Customs Appeals, and various other Departmental boards have been set up and authorized by acts of Congress, and the procedure before them determined by acts of Congress. Before such boards, therefore, it may well be that the strict rules of procedure such as the stating of objections and exceptions would have to be followed. But nowhere in the Immigration laws or in the laws organizing the Department of Labor has there been any authorization whatsoever for the Board of Review. It has been drawn out of thin air by the Department of Labor. It has no status whatever other than a clerical board before whom a roundtable discussion takes place in order to relieve the Secretary of Labor and his assistant secretaries from the details of going through the various cases. It has been formerly held that the Secretary of Labor could not delegate his power in these matters to the Commissioner of Immigration (*Low Kwai v. Backus,* 229 Fed. 481). Of course, the Assistant Secretaries of Labor and the assistants to the Secretary are empowered to act in these matters now by Statute. 5 U. S. C. 613-a (Act, March 4, 1927, c. 498.) But even if the Secretary should have the power to delegate his function of making the final decision in deportation cases to the Board of Review, still that Board of Review is not a judicial, nor even a quasi judicial, Board, but is only a group of men, having no rules of practice or procedure. *No records of their proceedings are kept or required to be kept by law.* Their findings are based on informal discussion. How can an attorney be required to follow any strict rules of procedure before a Board so constituted?

Even if the Board of Review could be clothed with a judicial character, still the unfairness in depriving an alien of due process of law is so flagrant and so unjust, so highhanded, as to be such that a reviewing court should consider it even though no objections had been made. The general rule is well stated in 3 *Corpus Juris* 744 as follows:

> "An exception to the general rule that an appellate court will not consider objections first raised on appeal exists in the case of errors which are apparent on the face of the record, and which are either fundamental in their character or determine a question on which the case depends, so that the objection, if made, could not have been obviated. Such errors may be considered by the court, although not objected to below. Nor will a failure to object in the court below preclude a review on appeal where there was no reasonable opportunity to object. It has also been held that the rule is not an absolute one, and that it will not be applied where it would, under the circumstances of the case, result in injustice; * * *

II.

On page 4 of the court's opinion, the court said:

> "There is found in the record transmitted to this court an anonymous letter, dated April 25, 1929, addressed to the Los Angeles Immigration Station of San Pedro, California, signed 'A citizen of Los Angeles.' No reference is made in the file to this letter. The inspector in his recommendation, does not refer to it. Apparently it was forward to Washington with his recommendation. After the records arrived in Washington the attorney for the appellant was given an opportunity to inspect the record, and wrote a brief, in which no reference whatever is made to this anonymous letter. The Board of Review subsequently recommended the order of deportation, which was made by the Assistant Secretary of Labor,

> upon that recommendation, and in their recommendation they nowhere allude to the anonymous letter. So far as appears, no attention whatever was given to this letter, either by the immigration authorities or by the appellant."

This statement of the learned judge is confusing to counsel for appellant, for we bear in mind that there is a distinction between "Assistant Secretaries" and "Assistants to the Secretary." Those practicing before the Immigration Service as counsel realize that assistant secretaries are executive officers, whereas the assistants to the secretary are clerical only and perform only clerical duties.

Adverting to the statement that "no reference is made in the file to this letter," we desire to point out that the letter was referred to by the local office in its letter of transmittal to Washington, *and the Board of Review's particular attention was called to it.* In the immigration file will be found a red sheet of paper entitled "Transmission of Record of Warrant Hearings," which is the official letter from the Los Angeles office transmitting the record in the case to Washington. At the bottom of that letter we find the following statement:

> "Attached hereto *for information of the Reviewing Board*, copy of letter addressed this office by the Inspector in Charge, San Pedro, wherein *the evidence and circumstances surrounding* the case are set forth." (Italics ours.)

There we find a direct reference to the letter of Inspector Gatley with a statement that it was sent for *the use* of the Board of Review. Attached to that red sheet is Inspector Gatley's letter which has with it the anonymous communication. The postscript to Inspector Gatley's letter expressly says:

"*Note* attached copy of anonymous letter received April 30, 1929." (Italics ours.)

How can it be said that the attention of the Board of Review was not expressly directed to Inspector Gatley's letter, as well as the anonymous communication?

The Board of Review's attention being directed to these unfair documents, it must be presumed, in the absence of any statement by the Board to the contrary, that these documents were considered by it along with the rest of the record forwarded to the Board by the Los Angeles office. Furthermore, the Board of Review *must* have used the information contained in the anonymous communication in order to sustain its finding that Keizo Kamiyama entered the United States "surreptitiously near Calexico, California, subsequent to July 1, 1924." (Decision of Board of Review, June 18, 1929.) *There is not another scintilla of evidence in the record* establishing *that the alien on trial entered subsequent to that date.* There is only the suspicion that the alien is not Keizo Kamiyama, acquired from the *ex parte* statement taken from him while in jail without a warrant, and from the failure of certain people to identify a photograph. But even this suspicion or even this conclusion if it were sound would not establish that he entered the United States "subsequent to July 1, 1924." The only evidence in the record having anything at all to say that he entered subsequent to July 1, 1924, is the anonymous communication and the conclusion of Mr. Gatley. Thus, it must be concluded that not only was the Board's attention called to these *ex parte* letters, but considerable weight was given to those letters by the Board.

We again quote from the opinion of this Honorable Court on page 4:

> "Appellant asserts in the brief that 'the document was sent on as evidence in the case. It was not shown to the alien, nor was he allowed or permitted to see it, nor to cross-examine its author.' There is no evidence to substantiate this assertion."

We desire here to point out that there is evidence in the record to substantiate the quoted assertion in our brief. In the first place our statement that the document "was sent on as evidence in the case" is established by another reference to the document entitled "Transmission of Records of Warrant Hearings." Under the heading "Comment" the District Director at Los Angeles states that he is sending the copy of the letter written by Inspector in Charge at San Pedro "wherein *the evidence* and circumstances surrounding the case are set forth." In other words, the District Director tells the Board of Review that the evidence in the case is fully set forth in the Inspector in Charge's letter and this letter contained a copy of the anonymous communication and a direct reference to it in the postscript. We believe these facts establish our assertion that the document was sent on as evidence in the case.

Our assertions that the documents were not shown the alien, nor was he permitted to see them or cross-examine the author is likewise borne out by the record. The final hearing was held at San Pedro on March 13, 1929. If the court will examine page 17 of the record of that hearing, it will note that the case was closed on that date and the trial inspector then and there made his findings and recommendation. The case was over; no more evi-

dence could have been introduced by the alien, and certainly none *should have been introduced* after that date by the Immigration Service without notifying counsel or the alien of a reopening. The record establishes that no reopening after that date was ordered and that at no time thereafter was the alien given an opportunity to offer any evidence. The very extraordinary letter of the San Pedro inspector in charge is dated May 9, 1929, or almost two months after the hearing was completed, and was sent in by the Los Angeles office to Washington on May 22 with the record of the completed hearing. Thus was the alien deprived of any opportunity to see the communications before the case was closed, or to offer any evidence to refute the evidence set forth in the communications. Nor was there any time when he could have cross-examined the author of the anonymous communication or see the files referred to by the inspector in charge. This is apparent for the reason that the record was immediately forwarded to Washington for final action.

Now, we wish to call the court's particular attention to the sentence on page 4 of its opinion:

> "After the records arrived in Washington the attorney for the appellant was given an opportunity to inspect the record, and wrote a brief, in which no reference whatever is made of this anonymous letter."

By permitting counsel in Washington to inspect the record does not mean that he was allowed to inspect the inter-departmental communications, but only the record of the hearings. Manifestly the inter-departmental communications containing the letter of Inspector Gatley and

the anonymous communication were no part of these hearings and in truth not part of the "record." Furthermore, counsel's brief before the informal Board of Review, for use at the round table discussion, proceeded on the theory that the alien had sustained the burden of proof, by proving his long-time residence in this country. Counsel had every reason to believe that on the merits of the case, the Board of Review would have decided in the alien's favor. As we have said, there is nothing whatever in the record indicating the alien landed in this country subsequent to July 1, 1924. The only evidence to this effect was contained in the anonymous communication and Inspector Gatley's letter which counsel had every reason to believe the Board would not use in its deliberations, but which obviously was considered. Their use was particularly harmful in the case at bar for the reason that the government must concede that there was considerable evidence in support of the alien's contention. In other words, if the alien's case had been particularly weak, the inclusion of this unfair document might not have been prejudicial, but where the alien's case was particularly strong, as in the case at bar, then it must be presumed that the unfair testimony in evidence was the factor on which the scales were balanced against him.

It is most apparent from the true record that the appellant advanced the defense that his deportation was barred by the statute of limitations. This defense is provided for by an Act of Congress. This defense was clear to the trial officer, Inspector Scott. The trial officer made his findings pursuant to Immigration Rule 18, subdivision D, paragraph 5, and are set out at page 17 of the hearing

of March 13th. (Immigration file.) It will be noted here that the trial officer is himself content to give his opinion that the alien entered subsequent to July 1, 1924, thus bringing the alien within the statute. Our view was then, and is now, that the duty of the Secretary of Labor was to determine whether or not the alien met the burden of proof on that issue, but a closer examination of this file will disclose that the necessity for determining that issue was removed from the Board of Review *by the action of the inspector in charge* who, it will be borne in mind, had nothing to do with the trial of the case. He was not content it seems with the trial officer's general conclusion. We invite the court's particular attention to the write-up and recommendation, not of the trial officer but the inspector in charge, where the following language appears in the last paragraph of that officer's conclusions and findings which, to be technical, we must assume are "findings of fact and conclusions of law":

> *"It is the opinion of this office that the alleged Keizo Kamiyama was smuggled into the United States about January 1, 1926, from Mexico."*

If true or even persuasive it removes all doubt from the Secretary of Labor's mind that the statute applies. *Where is there a single particle of testimony in the record to justify such a finding and conclusion? By no stretch of the imagination can such a finding and conclusion be drawn from the testimony.* It must be apparent that this statement is the creature of the inspector's mind in a desperate effort to break down the defense set up by the appellant. The pains with which the letter is prepared and its invitational character ("being forwarded

for information of the Reviewing Board"), support our theory. It is thus seen that a false statement is made by the inspector in charge and sent on for the information of the Board of Review. We must conclude, therefore, because of its false character and because of the use for which it was sent, that it was deliberately done to mislead the Board of Review, to remove from them the defense proven by the appellant, and in lieu of evidence on the subject.

It is difficult for counsel in this case, to believe that the court intends to permit such unfairness and such misconduct to go on in *an administrative arm* of this government because counsel did not follow a technical, judicial requirement of raising timely objection thereto.

III.

Petitioner now desires to refer briefly to several other portions of the opinion. On page 6, it is said:

> "The appellant also complains of the fact that he was examined by the inspector after his arrest. The record, however, shows that he was informed at the time of his arrest that it was the intention of the immigration authorities to question him and to use his statement as evidence in proceedings against him, and that he expressly consented to the examination, and, thus warned, answered the questions asked of him until he was confronted with an inconsistency in his statement and then refused to answer further questions. He cannot be heard now to object to that to which he formally assented, nor is there any inherent unfairness in questions asked under these circumstances. * * * Nor do we find in the record any objection to the use of this statement at the time of the hearing. As we understand the record, appellant withdrew all objections to the introduction of

this statement. If we are in error in this it is clear that no serious objection was made to this introduction. * * *"

An examination of the immigration file will show that counsel at all times strenuously objected to the statement taken from the alien while he was under arrest without a warrant and while he was being held incommunicado before any charges had been filed against him. The alien was arrested either on or before the 16th of November, 1928. On that day counsel addressed a letter to C. G. Gatley, inspector in charge of the United States Immigration Service at San Pedro, vigorously protesting against the arrest of this alien without a warrant and protesting against any *ex parte* statement being taken from him. Then, at the first regular hearing (December 27, 1929), the immigration file discloses a formal objection to the use of the statement:

"ATTY: Let the records show that copy of this testimony has been furnished to counsel and we have had opportunity to see it and are familiar with it. We object to the introduction of the statement, and request at this time that the letter of J. Edward Keating, attorney at law, dated Nov. 16th, addressed to the inspector in charge of this service at this office, be made part of the record. (Request of atty. granted.) (Letter referred to Marked 'Alien's Exhibit A' and made part of this record.)"

Immigration File, record of hearing of December 27, 1928, pages 1 and 2.

In this regard, we are perfectly in accord with the statement of the court on page 7:

"Had objection been made to the affidavit or statement secured by the immigration authorities after the arrest of the appellant and before his trial, the

> immigration authorities could have withheld the affidavit and utilized the same in cross-examining the appellant."

Now, it being manifest that counsel did object in the only way he could before and at the trial, the immigration service should have proceeded as indicated by the court in the foregoing quotation and by not doing so have deprived him of a fair hearing. The only proper and honest procedure would have been to have put the inspector on the stand to prove the statement so that counsel might have the opportunity to cross-examine him as was suggested in the case of *Ungar v. Seaman,* 4 Fed. (2d) 80 at ——.

On page 5 of the opinion, the court, in referring to the hearing of March 16, said:

> "In this connection it should be added that when the hearing was *renewed*, at the instance of the appellant, on March 16th, * * *" (Italics ours.)

The court evidently is referring to the hearing of March 13 instead of March 16, as we find no hearing of March 16 in the copy of the record furnished us which is presumably correct. However, an examination of the beginning of that hearing will show the following:

> "Continued hearing to show cause in the case of Keizo Kamiyama held at this time *by stipulation* of inspector and attorney for alien."

On page 3 of the opinion the court said:

> "It appears that *from the day after his arrest* appellant was represented by counsel, not only upon the hearing before the immigration authorities in San Pedro, California, but also before the Board of Review, which made the final order of deportation in Washington. * * *" (Italics ours.)

To be sure, the day after the alien was arrested, to-wit: on November 16, counsel addressed a letter to the Immigration Service, which was admittedly received by that Service on the next day. But notwithstanding this written appearance of counsel in the case, on the 17th, presumably after the receipt of that letter, the statement was taken from the alien which developed the discrepancies adverted to by the court on page 7 of the opinion. Can it be said that merely because the alien employed counsel that he has the benefit of counsel when the Immigration Service proceeded to examine him without advising counsel.

On pages 6 and 7 of the opinion, the court apparently takes the view that this alien, because he was relying on the period of limitation prescribed in section 19 of the Immigration Act of 1917 (8 U. S. C. 155) should be held to a stricter degree of proof than an alien who is trying to prove a legal entry into the United States. That defense is allowed by Congress, is absolute and is just as much a defense to deportation as the defense of a legal entry.

The last paragraph of the opinion states that the documentary evidence offered by Keizo Kamiyama was not entitled to much weight. In that regard, we would like to call the court's attention to the fact that in this case Keizo Kamiyama himself testified that he last entered the United States about February 13, 1920. He insisted upon this from the day he was arrested. At the hearing when all parties were represented, he produced documentary evidence in support of his statement. The fact that he had these documents and that they were dated prior to

1924 was certainly corroboration of his own statement. But in addition to the evidence, he had the positive testimony of Mr. Nishimoto that Mr. Nishimoto had known Keizo Kamiyama in this country for about four or five years. (Imm. File, Hearing Mar. 13th.) Opposed to that evidence on behalf of the alien there was not a scintilla of evidence taken at any of the regular hearings to the contrary. The only evidence, if such it can be called, consisted of the discrepancies as to age, made by Keizo Kamiyama at the *ex parte* examination after his illegal arrest and after counsel had protested against the taking of any statements from him until the regular hearing, and of the so-called failure of certain indiscriminate aliens to identify an unidentified photograph out of the presence and view of the alien, and of the anonymous communication and letter of inspector in charge, all put in the record after the hearing was over. It must be admitted that there was not a scintilla of evidence adduced *at the hearing* against Keizo Kamiyama. For these reasons we respectfully submit that the entire proceedings were so unfair as to deprive him of due process of law.

With all due respect to the learned judge's views expressed in this opinion we cannot help but feel that the safer and the soundest philosophy is that expressed by Mr. Justice Hand in *U. S. ex rel Iorio v Day* (C. C. A. 2nd, 1929), 34 Fed. (2nd) 920, 922:

> "The record discloses a very lax regard for the fundamentals of a fair hearing. *Much is tolerated in such proceedings, and that toleration has apparently borne its fruits.* We will not say that we can put our finger on this or that to reverse, but the attitude of the examiner, the introduction of confused

and voluminous evidence taken elsewhere, the strong indications that the appellant was vaguely regarded as undesirable, and that deportation was thought the easiest way to get rid of him and to avoid the normal processes of law—all these warn us of the dangers inherent in a system where prosecutor and judge are one and the ordinary rules which protect the accused are in abeyance. It is apparent how easy is the descent by short cuts to the disposition of cases without clear legal grounds or evidence which rationally proves them. These are the essence of any hearing in which the personal feelings of the tribunals are not to be substituted for prescribed standards." (Italics ours.)

Respectfully submitted,

J. Edward Keating and
Theodore E. Bowen,
Counsel for Appellant.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted, that the matter be reargued, and that the judgment of the District Court of the United States for the Southern Division of California, Central Division, be, upon further consideration, reversed.

Respectfully submitted,

J. Edward Keating and
Theodore E. Bowen,
Counsel for Appellant.

I, one of the counsel for the above named Keizo Kamiyama, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

.....
Counsel for Appellant.

No. 6178

United States

Circuit Court of Appeals

For the Ninth Circuit.

CITY OF RENO, a Municipal Corporation,
Appellant,

vs.

SIERRA PACIFIC POWER COMPANY, a Corporation,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Nevada.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Hon. LE ROY F. PIKE, City Attorney, Reno, Nevada, and Hon. SARDIS SUMMERFIELD, Reno, Nevada,

For Plaintiffs in Error.

Messrs. THATCHER & WOODBURN, Reno, Nevada,

For Defendant in Error. [1*]

PLAINTIFF'S EXHIBIT "A."

Filed Apr. 3, 1930. E. O. Patterson, Clerk. O. E. Benham, Deputy.

In the District Court of the United States of America, in and for the District of Nevada.

IN EQUITY—No. G.-29.

SIERRA PACIFIC POWER COMPANY, a Corporation,

Plaintiff,

vs.

CITY OF RENO, a Municipal Corporation, E. E. ROBERTS, Mayor of the City of Reno, JAMES GLYNN, City Engineer of the City of Reno, LE ROY F. PIKE, City Attorney of the City of Reno,

Defendants.

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*Page-number appearing at the foot of page of original certified Transcript of Record.

COMPLAINT.

To the Honorable FRANK H. NORCROSS, District Judge of the United States in and for the District of Nevada:

The plaintiff, Sierra Pacific Power Company, a corporation organized and existing under and by virtue of the laws of the State of Maine, and a citizen and resident of said state, brings this its complaint against the defendants above named, and each of them, and complains and alleges:

I.

That plaintiff is a corporation organized and existing [2] under and by virtue of the laws of the State of Maine, and is now, and at all times mentioned in this complaint was, a citizen and resident of said State of Maine, authorized and doing business in the State of Nevada and in Washoe County thereof. That the defendant, City of Reno, is a municipal corporation, organized and existing under and by virtue and pursuant to various and sundry acts of the Legislature of the State of Nevada, and was such corporation at all times mentioned herein, and that said defendant was and is a citizen and resident of the State of Nevada. That the defendant, E. E. Roberts, is now and for a number of years last past has been, the duly elected, qualified and acting Mayor of the City of Reno. That said defendant, at all times mentioned herein, was and is now a citizen and resident of the State of

Nevada and of the County of Washoe thereof. That the defendant, James Glynn, is now and for some time last past has been, the duly appointed and acting City Engineer of the City of Reno, and the head of the Engineering Department of said City, and said defendant is now, and for many years last past has been, a citizen and resident of the State of Nevada, and of Washoe County thereof. That the defendant, Le Roy F. Pike, is now and for sometime last past has been, the duly elected, qualified and acting Attorney of the City of Reno. That said defendant, at all times mentioned herein, was and is now a citizen and resident of the State of Nevada and of the County of Washoe thereof.

II.

That this suit is a controversy between the plaintiff, a resident and citizen of the State of Maine, and the defendants, who are each and all of them residents and citizens of the State of Nevada, and the amount of the controversy herein, exclusive [3] of costs and interest, greatly exceeds the sum and value of $3,000.00.

III.

That plaintiff is now, and plaintiff and its predecessors in interest for many years last past have been, engaged in selling, furnishing, serving and distributing water to the inhabitants of the Cities of Reno and Sparks, and to said Cities of Reno and Sparks, for domestic use and for commercial, fire and other purposes. That plaintiff and its predecessors in interest, at all times mentioned in

this complaint, and for more than twenty years last passed, owned, operated maintained plaints, reservoirs, pipelines, canals, ditches, diversion dams, water and water rights, mains and services, all of which were and now are used and useful in selling, furnishing, serving and distributing water to the inhabitants of the Cities of Reno and Sparks, and to said Cities of Reno and Sparks, for domestic use and for commercial purposes and for various and other sundry purposes. That plaintiff and its predecessors in interest, acting as aforesaid, have been acting under and by virtue of franchises and the right to furnish, serve, distribute and sell water to the inhabitants of the Cities of Reno and Sparks, and to said Cities of Reno and Sparks, for domestic use, commercial purposes, fire and other sundry purposes and uses. That plaintiff and its predecessors in interest, for more than twenty years last past, in the operation and maintenance of its said plant, pipelines, mains and services, have used the streets and alleys of said City of Reno and have laid, installed and maintained under said streets and alleys, mains, pipelines, services and various other sundry apparatus and equipment for the purpose of selling, furnishing, [4] serving and distributing water to the inhabitants of the City of Reno and to said City of Reno, for domestic use, commercial, fire and other purposes.

IV.

That for some months last past the plaintiff has installed upon and in certain of its services and

mains within the City of Reno, water meters and the foundations therefor; said water meters being installed for the purpose of measuring the amount of water passing through certain of the mains of the plaintiff and through certain of the services from said mains to individual customers and consumers. That said foundations and said meters so installed were installed and are maintained for various and sundry purposes and because of the following facts and circumstances:

That during the summer of the year 1929, the draught on the reservoirs of the plaintiff company, for the purpose of supplying water to the inhabitants of the Cities of Reno and Sparks and to said Cities of Reno and Sparks, reached a maximum of fourteen million gallons per day. That during the winters of 1929 and 1930, the draught on said reservoirs was from seven million to nine million gallons per day. That the amount of water so used by said Cities of Reno and Sparks is approximately Five Hundred gallons per capita per day and is far in excess of the amount of water necessary to be furnished to the inhabitants thereof for domestic, commercial, fire, irrigation and other proper purposes, and shows that there is a large and unnecessary waste of water within the Cities of Reno and Sparks by the users and consumers of the plaintiff. That plaintiff can only determine that there is a waste of water, the extent thereof, the persons, consumers, or classes of consumers, responsible therefor, by installing meters [5] to the different classes of consumers, domestic, commercial and others.

That it is necessary to install and maintain meters upon the lines, mains and services of the plaintiff for the purpose of determining and ascertaining whether or not there is any leakage out of the mains and services of the plaintiff and whether or not such leakage is due to any defect in such mains, lines and services. That it is necessary to install said meters so that the plaintiff may from time to time determine the amount of water that is, or should be, a normal and reasonable use for various classes of consumers in Reno and Sparks without wastage, and for the purpose of determining whether or not certain individual consumers and users are wasteful. That the installation of said meters is necessary in order that plaintiff may determine and ascertain from time to time the amount of water used by various of its consumers so that the company may from time to time classify its said consumers for the purpose of fixing and determining the rate classification to be charged for the service and to the classes of consumers using the same. That the installation of said meters is necessary and advisable to plaintiff in order that it may ascertain the actual amount of water which is necessary to be furnished to the City of Reno, the City of Sparks, and to the inhabitants of said cities, and so that plaintiff may from time to time provide for such additional water, or waters, as may be necessary for the conduct of its business and necessary to supply water to the inhabitants of the Cities of Reno and Sparks and to said cities, and provide service for the continued increase in population thereof.

That the meters so installed by the plaintiff, and other meters which the plaintiff intends [6] to install, operate and maintain, are and will be installed for the purposes hereinbefore set forth, and are and will be check meters for the purpose of giving to the company the information and data necessary and desirable in the operation of its business. That said meters have not been installed, nor will the meters which the company proposes to install, be installed for the purpose of fixing charges against the users and consumers of plaintiff in the City of Reno. That the meters which have been installed by plaintiff, as well as the meters which the company proposes to install, together with the foundations therefor, do not and will not constitute obstructions in any of the streets and alleys of the City of Reno. That said meters and foundations so installed, or to be installed, have been and will be so placed, installed and maintained, that they will in nowise obstruct the streets and alleys of the City of Reno, or in anywise interfere with the use of the same by said city, or the public.

V.

That on or about the 27th day of March, 1930, the City Attorney of the City of Reno, pursuant to instructions of the Mayor of the said City, the defendant E. E. Roberts, addressed to the plaintiff a letter in words and figures as follows:

"Sierra Pacific Power Company,
21 East Street,
Reno, Nevada.

Gentlemen:

It has been brought to the attention of the officials of the City of Reno that your company is installing water meters in the public streets and alleys of the City of Reno.

These meters are being installed in violation of Section 13 of an Act of the Legislature of the State of Nevada entitled: 'An Act defining public utilities, providing for the regulation [7] thereof, creating a Public Service Commission, defining its duties and powers, and other matters relating thereto.' Statutes of Nevada, 1919.

These meters and the foundations for the same are also considered obstructions in the streets and alleys of the City of Reno, and are being installed without a permit from the City.

I have been instructed by the Mayor of the City of Reno to inform you that these meters and foundations for the same must be removed immediately, and that you are to cease installing meters in the streets and alleys.

I am further authorized to inform you that if the same are not removed immediately that the Engineering Department of the city will remove the same, and that you will be held liable for damages to the public streets of the City of Reno.

Very truly yours,
(Signed) LE ROY F. PIKE,
City Attorney."

LFP:FO

And thereafter, on the 28th day of March, 1930, the defendant, Le Roy F. Pike, as said City Attorney, pursuant to instructions of the defendant, E. E. Roberts, Mayor of the City of Reno, sent to plaintiff a letter in words and figures as follows:

"Sierra Pacific Power Company,
Reno, Nevada.

Gentlemen:

Mayor E. E. Roberts of the City of Reno instructed me this morning to inform you that a number of meters have been installed on the various streets of the City of Reno by your Company without the permission of the City or the property owners, and that you are to be given ten days within which to remove the same.

If these meters are not removed within ten days the City Engineering Department will remove the same, and all costs connected therewith, including damages to the streets, will be charged against you.

Very truly yours,
LE ROY F. PIKE,
City Attorney. (Signed)" [8]

VI.

That the defendants threatened to and will, unless restrained by order of this honorable court, remove the meters and foundations for the same, and enter in and upon the property of the plaintiff and its lines, mains and services, and remove therefrom and destroy the meters and foundations so installed by plaintiff upon its said mains, lines and property, and to obstruct and prevent the plaintiff from installing

or maintaining upon its mains, lines and services in the City of Reno, meters and foundations and other apparatus and appliances, all of which will be to the great and irreparable damage and injury of the plaintiff. That in order to protect the plaintiff in its rights as aforesaid, and in the possession of its property and in its right to operate and maintain its said plant, pipes, mains, services and equipments as a public utility, supplying the Cities of Reno and Sparks and their inhabitants, with water, it is necessary that plaintiff have the interposition of the equitable arm of this court in restraining the defendants, and each of them, *pendente lite,* from in any manner entering in or upon any part of portion of the plaintiff's property, or in or upon any of its mains, services, appliances or equipment, or from in any manner interfering with, destroying or removing the meters and foundations therefor, installed and to be installed by the plaintiff upon its mains, services, and in and about its plant. That unless the defendants, and each of them, are restrained *pendente lite,* and until further order of this honorable court, they, and each of them, will enter in and upon the property of the plaintiff, and in and upon its mains, lines and services, and unlawfully and without right, remove therefrom such meters and foundations as have [9] been, or will be installed or maintained by the plaintiff thereon and therein. That said unauthorized action of said defendants is unlawful and without right, and is, and will be an unlawful invasion of the property rights of the plaintiff.

VII.

That because of the matters and things aforesaid, a temporary restraining order should be granted without notice, in that because of the matters and things aforesaid, immediate and irreparable loss and/or damage will result to the plaintiff before application for injunction can be heard upon notice.

VIII.

That plaintiff has no plain, speedy and adequate remedy in the ordinary course of law.

WHEREFORE, plaintiff prays:

I.

That this court issue, without notice, its restraining order, restraining the defendants, and each of them until hearing, from removing the meters and foundations of plaintiff so installed, or to be installed, upon plaintiff's property, lines, mains and services, and restraining said defendants, and each of them, their agents, servants and employees, from in anywise destroying the meters and foundations, or from obstructing or in anywise preventing the plaintiff from installing or maintaining upon its mains, lines, and services in the City of Reno, such meters and foundations, or other apparatus and appliances. That upon hearing, said restraining order be continued as an injunction, *pendente lite,* to continue until final determination of this action, or until further order of the above-entitled court, and upon final hearing [10] that plaintiff have judgment and decree against the defendants, and each of them, perpetually enjoining said defendants,

and each of them their agents, servants and employees, and all persons acting by, under or through them, or either or any of them, from removing any meters or foundations for the same, installed, or to be installed, operated and maintained, upon the property of the plaintiff, and upon its lines, mains and services, and enjoining said defendants, their agents, servants and employees, from in anywise removing said meters, or destroying the same, or the foundations so installed for such meters by plaintiff upon its property, mains, lines, and services, and perpetually enjoining said defendants, and each of them, from in anywise interfering with the plaintiff in the installation and maintenance upon its mains, lines and services, of meters, foundations and other apparatus and appliances necessary to the *conuct* of plaintiff's business, and to the operation of its said property so used as part of its water plant in the City of Reno.

II.

For cost of suit.

III.

For such other and further relief as may be just and equitable in the premises.

GEO. B. THATCHER,
WM. WOODBURN,
Attorneys for Plaintiff. [11]

United States of America,
State of Nevada,
County of Washoe,—ss.

George A. Campbell, being first duly sworn, deposes and says: That he is the manager of the Sierra Pacific Power Company, the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to matters therein stated on information and belief, and as to such matters, he believes it to be true.

GEORGE A. CAMPBELL.

Subscribed and sworn to before me this 3d day of April, 1930.

[Seal] W. E. ZOEBEL,
Notary Public in and for the County of Washoe, State of Nevada.

[Endorsed]: No. G.–29. U. S. District Court, Nevada. Sierra Pacific Power Co., Plaintiff, vs. City of Reno, Defendant. Plffs. Exhibit *No.* "A." Filed Apr. 24, 1930. E. O. Patterson, Clerk. By O. E. Benham, Deputy Clerk. [12]

SUBPOENA IN EQUITY.

District of Nevada,—ss.

The President of the United States of America to:

City of Reno, a Municipal Corporation, E. E. Roberts, Mayor of the City of Reno, James Glynn, City Engineer of the City of Reno, Le Roy F. Pike, City Attorney of the City of Reno, GREETING:

You are hereby commanded that you, and each of you, personally appear before the Judge of our District Court of the United States for the District of Nevada, at the courtroom thereof in Carson City, Nevada, to answer unto a complaint exhibited against you in said court, by Sierra Pacific Power Company, a corporation, and to do further and receive whatever said court shall have considered in that behalf.

WITNESS the Honorable FRANK H. NORCROSS, Judge of the District Court of the United States for the District of Nevada, and the seal of said court hereunto affixed, this 3d day of April, 1930, and of the year of our Independence the 154th.

[Seal] Attest: E. O. PATTERSON,
Clerk.
O. F. Pratt,
Deputy.

THATCHER & WOODBURN,
Solicitors for Complainant.

MEMORANDUM.

The defendants are required to file their answer or other defense in the Clerk's office at Carson City, Nevada, on or before the twentieth day after service, exclusive of the day thereof, otherwise the bill may be taken *pro confesso.*

E. O. PATTERSON,
Clerk.
By O. F. Pratt,
Deputy. [13]

RETURN ON SERVICE OF WRIT.

United States of America,
District of Nevada,—ss.

I hereby certify and return that I served the annexed subpoena in equity on the therein named James Glynn by handing to and leaving a true and correct copy thereof with him personally at Reno in said District on the 5th day of April, A. D. 1930.

J. H. FULMER,
U. S. Marshal.
By G. L. Plummer,
Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,
District of Nevada,—ss.

I hereby certify and return that I served the annexed subpoena in equity on the therein named City of Reno by serving its Mayor E. E. Roberts, *E. E. Roberts,* and Leroy F. Pike by serving his secretary at his office by handing to and leaving a true and correct copy thereof with each personally at Reno in said District on the 7th day of April, A. D. 1930.

J. H. FULMER,
U. S. Marshal.
By G. L. Plummer,
Deputy.

[Endorsed]: No. G.–29. United States District Court, District of Nevada. Sierra Pacific Power Company, a Corporation, Plaintiff, vs. City of Reno, a Municipal Corporation, et al., Defendants. Subpoena in Equity. Filed on return this 9th day of April, 1930. E. O. Patterson, Clerk. By O. F. Pratt, Deputy. Civil Docket No. 1911. [14]

Filed April 5th, 1930. E. O. Patterson, Clerk. By ————, Deputy.

Refiled April 9, 1930. E. O. Patterson, Clerk. By O. F. Pratt, Deputy.

[Title of Court and Cause.]

RESTRAINING ORDER.

Upon the reading of the verified complaint on file herein, and upon application and motion of attorneys for plaintiff, for the issuance of a restraining order and an injunction *pendente lite,* as prayed for in the verified complaint; and it appearing from the verified complaint on file herein, and the Court being of the opinion therefrom that irreparable loss and/or damage will result to the plaintiff, unless a temporary restraining order is granted without notice,—

NOW, THEREFORE, IT IS ORDERED that the defendants, City of Reno, a municipal corporation, E. E. Roberts, Mayor of the City of Reno, James Glynn, City Engineer of the City of Reno, [15] Le Roy F. Pike, City Attorney of the City of Reno, and each of them, their agents, successors, deputies, servants and employees, and all persons acting by, through or under them or either of them or by or through their order, be, and they are hereby, restrained until the 12th day of April, 1930, and until the hearing of the application of plaintiff for its interlocutory injunction, from in any manner removing the meters and foundations of plaintiff so installed, or to be installed, upon the plaintiff's property lines, mains and services in the City of Reno; and restraining said defendants, and each of them, their agents, servants and employees, and all persons acting by, under or through them, or

either of them, from in anywise destroying the said meters and foundations so installed upon plaintiff's property in the City of Reno, or from in anywise obstructing or preventing the plaintiff from installing or maintaining upon its mains, lines and services in the City of Reno, said meters and foundations, and enjoining the defendants, and each of them, from bringing, maintaining or prosecuting, or causing to be commenced, brought or maintained or prosecuted any suit or action or proceeding, for the purpose of preventing the plaintiff from installing or maintaining meters and foundations upon its lines, mains and services and property in the City of Reno.

IT IS FURTHER ORDERED that plaintiff file a bond, conditioned as required by law, in the sum of $5,000.00 for the payment of all damages which may accrue by virtue of the issuance of this restraining order.

Dated this 4th day of April, 1930.

FRANK H. NORCROSS,
District Judge. [16]

RETURN OF SERVICE WRIT.

United States of America,
District of Nevada,—ss.

I hereby certify and return that I served the annexed restraining order on the therein named James Glynn by handing to and leaving a true and correct

copy thereof with him personally at Reno in said District on the 5th day of April, A. D. 1930.

J. H. FULMER,
U. S. Marshal.
By G. L. Plummer,
Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,
District of Nevada,—ss.

I hereby certify and return that I served the annexed restraining order on the therein named City of Reno, by serving its Mayor, E. E. Roberts, *E. E. Roberts,* and LeRoy F. Pike by serving his secretary by handing to and leaving a true and correct copy thereof with each personally at Reno in said District on the 7th day of April, A. D. 1930.

J. H. FULMER,
U. S. Marshal.
By G. L. Plummer,
Deputy. [17]

Filed Apr. 5, 1930. E. O. Patterson, Clerk. By O. E. Benham, Deputy.

[Title of Court and Cause.]

UNDERTAKING ON TEMPORARY RESTRAINING ORDER.

Whereas, the above-named plaintiff has commenced, or is about to commence, an action in the above-entitled court, against the above-named de-

fendants and is about to apply for a temporary restraining order in said action, against the said defendants, enjoining and restraining them from the commission of certain acts, as in the complaint filed in the said action is more particularly set forth and described:

NOW, THEREFORE, the undersigned, National Surety Company, a corporation of the State of New York, as Surety, in consideration of the premises, and of the issuing of said temporary restraining order, does hereby undertake in the sum of Five Thousand Dollars, and promise to the effect that, in case said temporary restraining order shall issue, the said plaintiff will pay to the said parties enjoined, such damages, not exceeding the sum of Five Thousand Dollars, as such parties may sustain by reason of said temporary restraining order, if the said court finally decides that the said plaintiff was not entitled thereto.

IN WITNESS WHEREOF, the National Surety Company has caused this undertaking to be signed and its corporate seal affixed by its duly authorized attorney-in-fact at San Francisco, California, this 1st day of April, 1930.

NATIONAL SURETY COMPANY. (Seal)
By R. W. STEWART,
Attorney-in-fact.

The foregoing bond is hereby approved this 4th day of April, 1930.

FRANK H. NORCROSS,
District Judge. [18]

State of California,
City and County of San Francisco,—ss.

On this 1st day of April, in the year One Thousand Nine Hundred and 30, before me Dorothy H. McLennan, a notary public in and for the city and county of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared R. W. Stewart, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of National Surety Company, a corporation, and he acknowledged to me that he subscribed the name of National Surety Company thereto as principal, and his own name as attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in said city and county of San Francisco the day and year in this certificate first above written.

[Seal] DOROTHY H. McLENNAN,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires December 23, 1930. [19]

Filed April 9th, 1930. E. O. Patterson, Clerk.
By ————, Deputy.

[Title of Court and Cause.]

STIPULATION CONTINUING HEARING ON INJUNCTION TO APRIL 24, 1930, ETC.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the hearing of plaintiff's application for injunction *pendente lite* may be continued from the 12th day of April, 1930, to the 24th day of April, 1930, at the hour of ten o'clock A. M. of said day.

IT IS FURTHER STIPULATED by and between the parties hereto that the restraining order now in effect shall be continued in full force and effect until said date, and until hearing of said application for injunction *pendente lite,* and that the above-entitled court or the Judge thereof may so order.

Dated: This 8th day of April, 1930.

GEO. B. THATCHER,
WM. WOODBURN,
Attorneys for Plaintiff.

LE ROY F. PIKE,
Attorney for Defendants. [20]

Filed April 10th, 1930. E. O. Patterson, Clerk. By ————, Deputy.

[Title of Court and Cause.]

ORDER CONTINUING HEARING ON INJUNCTION TO APRIL 24, 1930, ETC.

Pursuant to stipulation of the parties to the above-entitled action, IT IS HEREBY ORDERED that the hearing of plaintiff's application for an injunction *pendente lite* in the above-entitled case, be and the same is hereby continued to the 24th day of April, 1930, at the hour of ten o'clock A. M. of said day, and

IT IS FURTHER ORDERED that the restraining order heretofore issued in the above-entitled action be and the same is hereby continued in full force and effect until said April 24, 1930, and until hearing of plaintiff's application for injunction aforesaid.

Dated: This 10th day of April, 1930.

FRANK H. NORCROSS,
District Judge. [21]

Filed April 24, 1930. E. O. Patterson, Clerk. By ————, Deputy.

[Title of Court and Cause.]

MOTION TO DISMISS COMPLAINT AND TO DISSOLVE TEMPORARY RESTRAINING ORDER.

Now come the above-named defendants by Le Roy F. Pike as their attorney and Sardis Summerfield

as their solicitor and moves the Court to dismiss the bill of complaint filed in the above-entitled action and to dissolve the temporary restraining order issued and served in said action upon the grounds and for the reasons following, to wit:

I.

That said bill of complaint is void for want of equity and does not state facts sufficient to entitle plaintiff to the equitable relief prayed for in its bill of complaint or to any relief whatever as more particularly appears therefrom in the following respects, viz.:

(a) That it affirmatively appears from the face [22] of said bill of complaint that plaintiff as a public utility corporation is engaged in the business of serving and distributing water to defendant, City of Reno, a city of more than ten thousand population, and to the inhabitants thereof, for domestic and other beneficial purposes and that the relief sought by plaintiff in this action is an injunction prohibiting and preventing defendants from obstructing plaintiff from installing or maintaining water meters upon or in the streets and alleys of defendant, City of Reno, with which to measure the quantity of water served or delivered to said defendant, City of Reno and to the inhabitants thereof as water users and that said alleged relief if permitted would be in violation of the direct terms of that certain statute of the State of Nevada entitled "An Act defining public utilities, providing for the regulation thereof, creating a public service com-

mission, defining its duties and powers, and other matters relating thereto," approved March 28, 1919, and particularly of the terms of the proviso contained in section 13 of said statute.

(b) That said bill of complaint fails to state any facts entitling it to install or to maintain water meters upon or in the streets and alleys of defendant, City of Reno, with which to measure the quantity of water served or delivered to said City, or to the inhabitants thereof, in that it is not alleged or stated therein that plaintiff has the permission or consent of defendant, City of Reno, or of the Public Service Commission of the State of Nevada, or of any other authority whatever, to so install or maintain such water meters in or upon said places. [23]

(c) That said bill of complaint fails to allege or state any grant, provision, or term, contained in any franchise or franchises under which it has been acting and serving and distributing water to defendant, City of Reno, and to the inhabitants thereof, authorizing it to install or to maintain water meters upon or in the streets or alleys of said defendant for the purpose of measuring the quantity of water served or delivered to said City or to its inhabitants, or for any other purpose whatever, or at all.

(d) That it does not appear from plaintiff's bill of complaint that plaintiff's occupancy and use in the past of the streets and alleys of defendant, City of Reno, for the installation and maintenance of its instrumentalities for serving and distributing water by virtue of any grant,

franchise, or authority so to do or was exercised by plaintiff in any other way, or manner than that of a seizor and trespasser.

(e) That it does not appear from the facts alleged in plaintiff's bill of complaint that plaintiff now is, or ever has been engaged in the business of selling or furnishing water to defendant, City of Reno, or to the inhabitants thereof, but that upon the contrary it affirmatively appears therefrom that it now is, and at all times mentioned in its bill of complaint has been, no more than the agent of said defendant and its inhabitants for the diversion, transportation, distribution, and delivery of such water.

(f) That said bill of complaint fails to state facts sufficient to show any necessity whatever for the installation or maintenance of any water meters in or upon the streets or alleys of the defendant, City of Reno.

(g) That said bill of complaint does not state facts sufficient to show that the installation and maintenance [24] of water meters upon or in the streets and alleys of defendant, City of Reno, will not constitute an obstruction to the proper and reasonable use thereof by the said defendant and by the general public.

II.

That it affirmatively appears from the allegations of plaintiff's bill of complaint that plaintiff has no interest in the subject matter of said bill in that it appears therefrom that plaintiff is the mere agent of defendant, City of Reno, and of its in-

habitants in the diversion, transportation, distribution, and delivery of water to said city and its inhabitants and fails to allege that it is not or will not be fully compensated for its said services.

III.

That there is a nonjoinder of necessary parties in said bill of complaint in that it appears therefrom that the alleged grievances pleaded in said bill of complaint are imputable in uncertain part to the City of Sparks and its inhabitants and that said City of Sparks is not made a defendant in said action.

IV.

That said bill of complaint is multifarious in that it appears therefrom that the alleged wastage of water by the Cities of Reno and Sparks and by the respective inhabitants thereof and the consequent injury to plaintiff thereby constitutes a joint liability by the said municipalities and their respective inhabitants and not a several liability of defendant, The City of Reno, alone, or of the said last-named City or its inhabitants alone.

V.

That said bill of complaint is indefinite and uncertain [25] in the following respects, to wit:

(a) That it is impossible to ascertain therefrom whether plaintiff's alleged franchises are derivative from the State of Nevada, or the City of Reno, or the City of Sparks, or from all of either thereof.

(b) That it is impossible to ascertain therefrom what part or parts of plaintiff's plant equip-

ment for serving and delivering water to defendant, City of Reno, and its inhabitants, is maintained and operated by virtue of a franchise *of* franchises and what part thereof is maintained by virtue of mere occupancy, use, or claim or right.

VI.

That the restraining order issued in this action was improvidently issued in that the same was issued without notice to the opposite parties, or to either thereof, in the absence of any allegation or allegations in any affidavit or in the verified bill of complaint clearly showing specific facts that would result in immediate and irreparable injury, loss, or damage to plaintiff before notice could be served and a hearing had upon the application therefor.

VII.

That the restraining order issued in this action fails to define any injury and to state why it is irreparable and why it was granted without notice.

VIII.

That the restraining order issued in this action is in effect a judicial license enabling plaintiff to enlarge and increase its installation and operation of the particular subject matter of controversy between plaintiff and defendants and is not limited to preservation of the *statu quo* of such contro-

verted subject matter until the merits thereof can be heard and determined.

LE ROY F. PIKE,
Attorney for Defendants.
SARDIS SUMMERFIELD,
Solicitor for Defendants. [26]

[Title of Cause.]

MINUTES OF COURT—APRIL 24, 1930—HEARING ON APPLICATION FOR INJUNCTION PENDENTE LITE, ETC.

This being the time heretofore set for hearing on plaintiff's application for injunction *pendente lite,* and the same coming on regularly, Hon. Geo. B. Thatcher appeared for and on behalf of plaintiff; Messrs. LeRoy F. Pike and Sardis Summerfield appeared for the defendants. Upon stipulation of counsel the official reporter was called to report these proceedings upon the usual terms. Mr. Thatcher asked that plaintiff's application for injunction *pendente lite* be heard ahead of defendant's motion to dismiss complaint and to dissolve temporary restraining order, which was filed this day by Mr. Summerfield to which objection was made by Mr. Summerfield.

IT IS BY THE COURT ORDERED that plaintiff's application be heard at this time. Mr. Thatcher offered in evidence bill of complaint herein, which was admitted over objection and ordered marked Plffs. Ex. *No.* "A,"—considered read

into the record; also copy of minutes of County Commissioners of Washoe County, of date of December 14, 1874, offered, admitted over objection and ordered marked Plffs. Ex. *No.* "B"; also copy of minutes of County Commissioners of Washoe County, of date of March 5, 1879, offered, admitted over objection and ordered marked Plffs. Ex. *No.* "C"; also copy of deed from Reno Water Company [27] to Reno Water, Land and Light Company, dated Nov. 11, 1889, offered, admitted over objection and ordered marked Plffs. Ex. *No.* "D"; also copy of deed from Reno Water, Land and Light Company to Nevada Power, Light and Water Company, dated March 12, 1902, offered, admitted over objection and ordered marked Plffs. Ex. *No.* "E"; also copy of deed from Nevada Power, Light and Water Company to Reno Power, Light and Water Company, dated April 14, 1904, offered, admitted over objection and ordered marked Plffs. Ex. *No.* "F"; and also original deed from Reno Power, Light and Water Company to the Truckee River General Electric Company, dated June 30, 1922, offered, admitted over objection and ordered marked Plffs. Ex. *No.* "G." Defendants granted exceptions to the admittance of all of the aforesaid exhibits. Plaintiff rests on the evidence here introduced. No testimony being adduced by defendants the application for injunction *pendente lite* was submitted to and by the Court taken under advisement. Counsel here stipulated that defendants' motion to dismiss complaint and to dissolve temporary restraining order now come on for hear-

ing. After argument by counsel for the respective parties said motion was submitted to and by the Court taken under advisement. At the conclusion of argument by Mr. Thatcher he moved the Court that temporary injunction issue herein. Counsel for both parties filed with the Court their points and authorities used in this hearing. [28]

PLAINTIFF'S EXHIBIT "B."

MINUTES OF COUNTY COMMISSIONERS OF WASHOE COUNTY—DECEMBER 14, 1874—ORDER GRANTING RIGHT TO RENO WATER COMPANY TO LAY PIPES FOR CONVEYING WATER.

The minutes of the County Commissioners of Washoe County on December 14, 1874, at page 176 offers the following:

> "A petition was presented from various citizens of Reno and vicinity praying the Board to grant to the Reno Water Company the right to lay down water pipes in the streets and alleys of Reno, for the purpose of distributing and conveying water. Whereupon it was ordered that the Reno Water Company be granted the right of way to lay down pipes in the Streets and alleys of the town of Reno for the purpose of conveying and distributing water."

[Endorsed]: No. G.–29. U. S. District Court, Nevada. Sierra Pacific Power Co., Plaintiff, vs.

City of Reno et al., Defendant. Plffs. Exhibit *No.* "B." Filed Apr. 24, 1930. E. O. Patterson, Clerk. By O. E. Benham, Deputy Clerk. [29]

PLAINTIFF'S EXHIBIT "C."

MINUTES OF COUNTY COMMISSIONERS OF WASHOE COUNTY—MARCH 5, 1879—ORDER GRANTING RENO WATER COMPANY RIGHT TO LAY WATER PIPES IN TOWN OF RENO.

In the minutes of the County Commissioners of March 5, 1879, page 590, is found the following:

> "It was ordered that the present owners of Reno Water Co., now represented to us by A. A. Evans, an owner in said water co., be, and is hereby granted the right of way and privilege of laying water pipes through the streets and alleys of said town of Reno in said Incorporated town, and that said company leave such ground as they may lay such pipes through in as good condition as prior to laying such pipes."

[Endorsed]: No. G.–29. U. S. District Court, Nevada. Sierra Pacific Power Co., Plaintiff, vs. City of Reno et al., Defendant. Plffs. Exhibit *No.* "C." Filed Apr. 24, 1930. E. O. Patterson, Clerk. By O. E. Benham, Deputy Clerk. [30]

PLAINTIFF'S EXHIBIT "D."

DEED OF CONVEYANCE.

RENO WATER CO.

to

RENO WATER, LAND & LIGHT CO.

This indenture, made this 11 day of November A. D. 1889, between the Reno Water Co., a corporation, the party of the first part, and the "Reno Water, Land and Light Company" a corporation, the party of the second part, both said corporations having been duly organized under the laws of the State of Nevada, with their principal places of business in Reno, Washoe County, State aforesaid, Witnesseth: That whereas said party of the first part, has acquired and is the owner of large property interests in Washoe County, Nevada, and more particularly in the town of Reno in said County and State; and whereas, the Board of Trustees of said party of the first part, duly assembled, duly passed the following resolutions: "It is resolved by the Board of Trustees of the Reno Water Company, a corporation, that it is for the best interests of said Company to sell, transfer and convey all its property of every nature and description in Washoe County, State of Nevada to the 'Reno Water, Land and Light Company,' a corporation, and C. C. Powning the President and J. F. Emmitt, the Secretary of the 'Reno Water Company' aforesaid, are hereby authorized and instructed to make, execute and deliver to said 'Reno Water, Land and

Light Company' for, in behalf of, and as the act of the 'Reno Water Co.,' corporation, a deed of conveyance of all and every part, nature and description of its property, both real and personal, and take therefor, and from said 'Reno Water, Land and Light Company,' corporation, and as the full [31] consideration for said conveyance, the sum of One Dollars, lawful money of the Government of the United States of America, and further: that the said President and Secretary, before the signing and ensealing and delivery of said Conveyance, to see that all debts and liabilities of said 'Reno Water Company' are properly cancelled and paid in full."

Now, Therefore, in pursuance of said resolution, and in consideration, of the sum of One Dollar, receipt of which is hereby acknowledged, the said party of the first part doth by these presents grant, bargain, sell, convey and confirm, unto the said party of the second part, forever, all its right, title and interest, both in law and equity, in and to all its watermains, water pipes, water valves and shut-offs now laid down in the streets of said town of Reno, also all its water mains and pipes and water valves laid down and leading from said town to that certain reservoir on Sec. 3, Tp. 19, N., R. 19 E., M. D. M., and always heretofore known and designated as the "Reno Water Companys reservoirs," together with all the rights of way through the lands of others, and through the streets of said town as obtained by said party of the first part, by reason of the laying of said watermains and

pipes aforesaid, together with all the right, title and interest of grantor in and to that certain reservoir located on Block 14, in the Western Addition to the town of Reno, and known as the Whitaker reservoir'' and supplied with water from the Orr Water Ditch; also all the right, title and interest of grantor in and to that certain reservoir located near the State University, and known and designated as the University reservoir''; also all personal property of every [32] nature and description, belonging to, and now in the possession of grantor herein, consisting of about 4,000 feet of iron water pipes, ranging in diameter from three-quarters of one inch to eight inches, together with all tools, both of wood and iron, used in, and about the construction, maintenance and repairing of said grantor's system of water works; also, one iron filter, known as the ''Arnold filter'' excepting therefrom, such portions thereof as may from time to time, been heretofore sold, disposed of, or used in and about other portions of the works; together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. To Have and to Hold, all and singular the said premises, together with the appurtenances, unto the said party of the second part, heirs and assigns forever.

In Witness Whereof, the said party of the first part, by resolution of its Board of Trustees, hath caused these presents to be subscribed by its Presi-

dent and Secretary the day and year first above written.

RENO WATER CO.
Per C. C. POWNING,
President.
J. F. EMMITT,
Secretary.

State of Nevada,
County of Washoe,—ss.

On this sixteenth day of November, A. D. one thousand eight hundred and eighty-nine, before me, T. V. Julien, County Clerk and *ex-office* Clerk of the District Court, State of Nevada, in and for said Washoe County, personally appeared [33] C. C. Powning, President of the Reno Water Company, Corporation, and J. F. Emmitt, Secretary of said Reno Water Company, corporation, personally known to me to be the individuals described in and who executed the annexed Instrument, who each as such President and Secretary, duly acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned. Witness my hand and Seal of said Court, at Reno, in said County, the day and year in this certificate first above written.

[Seal] T. V. JULIEN,
Clerk.

Recorded at request of C. C. Powning. Filed Nov. 16, A. D. 1889, at 45 min. past 3 P. M.

JNO. B. WILLIAMS,
County Recorder.

"14"—363.

[Endorsed]: H.–33. No. G.–29. U. S. District Court, Nevada. Sierra Pacific Power Co., Plaintiff, vs. City of Reno et al., Defendant. Pltffs. Exhibit *No.* "D." Filed Apr. 24, 1930. E. O. Patterson, Clerk. By O. E. Benham, Deputy Clerk. [34]

PLAINTIFF'S EXHIBIT "E."

DEED OF CONVEYANCE.

(United States Int. Rev. stamps $121.25 canceled.)

THE RENO W. L. & L. CO.

to

NEVADA P. L. & W. CO.

This Indenture, made this twelfth day of March, in the year of our Lord, one thousand nine hundred and two, Between The Reno Water Land and Light Company, a corporation, duly incorporated under the laws of the State of Nevada, the party of the first part, and Nevada Power Light and Water Company, a corporation duly incorporated under the laws of the State of California, the party of the second part,

Witnesseth: That the said party of the first part, for and in consideration of the sum of Ten Dollars, in gold coin of the United States of America, and other good and valuable considerations in hand paid to the said party of the first part by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said party of the

second part, and to its successors and assigns forever, all those certain lots, pieces or parcels of land, situate, lying and being in the County of Washoe, State of Nevada and bounded and particularly described as follows, to-wit:

1—All those certain lots numbered thirty-eight (38), thirty nine (39), forty (40), forty one (41), forty two (42), forty three (43) and forty four (44), situated, lying and being in the town of Reno, Washoe County, State of Nevada, and known and designated as River Front Lots, east from Virginia Street in the Town of Reno, Nevada, on the official map of said County.

2—All that certain piece of land situated, lying and being in Washoe County, State of Nevada, described as follows: [35] Commencing at a point 1.71 chains north from the quarter Section corner between Sections 2 and 3, Township 19 North, Range 19 East, Mount Diablo Base and Meridian, and running thence north 61° 45′ west 13.57 chains; thence south 2° 15′ west 17 chains: thence 73° 30′ east 13.11 chains; thence north 6.84 chains to the place of beginning.

3—That certain ditch known and designated as the Highland Ditch, on the north side of the Truckee River, heading at or near the Rail Road Bridge near Verdi, Washoe County, State of Nevada, and more particularly described in two instruments of record in the office of the County Recorder of Washoe County, State of Nevada, the one in Book F. of Miscellaneous Instruments at page 164, and the other in Book F. of Miscellaneous Instruments

at page 569 to which instruments and the record thereof special reference is hereby made.

4—That certain ditch and dam known as the Electric Light Ditch and Dam, situate on the south side of the Truckee River in Reno, running through the lands of Joseph Frey and Murray Brothers, and more particularly described in the certificate of location recorded in Volume F, on page 393 of the Miscellaneous Records in the office of the Recorder of Washoe County, State of Nevada, to which instrument and the record thereof special reference is hereby made.

5—All that certain lot, piece or parcel of land situated in Washoe County, State of Nevada, beginning at a point south 83° 30′ West (Magnetic Variation 17° 30′ East) in the north east quarter of the north east quarter of Section 15 distant 173 feet from the corners of Sections 10, 11, 14, and 15 in Township 19 North, [36] Range 19 East, Mount Diablo Base and Meridian; thence running west 311 feet and 3 inches; thence south 160 feet, thence east 233 feet and 3 inches and thence north 26° east 178 feet and 3 inches to the point of beginning.

6—All that certain lot, piece or parcel of land situated in Washoe County, State of Nevada, beginning at the center of the Electric Light Bridge at its intersection with the south bank of the Truckee River in Lot 2 of Section 15, Township 19 North, Range 19 East, Mount Diablo Base and Meridian; and running thence due south 263 feet, thence north 58-½° East 325 feet to a mound of stone; thence

due north 125 feet to the south bank of the Truckee River; and thence westerly and along the south bank of said river to point of beginning.

7—The northwest quarter of the south west quarter of Section 2, Township 19 North, Range 19 East, Mount Diablo Base and Meridian, in Washoe County, State of Nevada.

8—The fractional north east quarter of the South west quarter of Section 2, Township 19 North, Range 19 East, Mount Diablo Base and Meridian in Washoe County, State of Nevada.

9—Also all buildings, superstructures, machinery and apparatus for generating and distributing electric current or for making and distributing illuminating or fuel gas, now owned by the said party of the first part; also all poles, wires, mains, lamps, motors and lighting and distributing apparatus for electric light and all gas mains and pipes, lamps, posts, meter fixtures and other lighting and distributing apparatus, now owned by said party of the first part: also all reservoirs, pipes, aqueducts, flumes, ditches, mains, rights of way, franchises, easements, things in action, stock, bonds or other sureties, contracts, [37] claims and demands now owned by said party of the first part together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits, income, earnings, privileges, immunities and things incorporeal or otherwise growing out of or appertaining to said property of said party of the first

part; and also all other property of whatsoever nature and description, now owned by said party of the first part and also all the estate, interest and claim whatsoever in law as well as in equity, of the said party of the first part, in and to the above described property or any part thereof.

To Have and Hold, all and singular the said premises, together with the appurtenances unto the said party of the second part and to its successors and assigns forever.

In Witness Whereof, the said party of the first part has caused its corporate name and seal, to be hereunto affixed the day and year first above written in accordance with a resolution of its Board of Trustees.

THE RENO WATER LAND AND LIGHT COMPANY.

By P. L. FLANIGAN,

(Corporate Seal) President.

And W. L. BECHTEL,

Secretary.

Signed, sealed and delivered in the presence of

_____.

State of Nevada,
County of Washoe,—ss.

On this twenty first day of March in the year of our Lord one thousand nine hundred and two, before me, J. A. Bonham [38] a Notary Public in and for the County of Washoe, duly commissioned and sworn, personally appeared P. L. Flanigan,

known to me to be the President and W. L. Bechtel, known to me to be the Secretary of The Reno Water Land and Light Company, the corporation described in, and which executed the annexed instrument, and they acknowledged to me that such corporation executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at Reno, in said County, the day and year in this certificate first above written.

[Seal] J. A. BONHAM,
Notary Public in and for Washoe County, State of Nevada.

Recorded at the request of W. L. Bechtel. Filed Mar. 25, A. D. 1902, at 01 mins. past 11 o'clock, A. M.

B. C. SHEARER,
County Recorder.

"22" 493.

[Endorsed]: No. G.–29. U. S. District Court, Nevada. Sierra Pacific Power Company, Plaintiff, vs. City of Reno et al., Defendant. Plffs. Exhibit *No.* "E." Filed Apr. 24, 1930. E. O. Patterson, Clerk. By O. E. Benham, Deputy Clerk. [39]

PLAINTIFF'S EXHIBIT "F."

DEED OF CONVEYANCE.

NEVADA POWER, LIGHT & WATER CO.

to

RENO POWER, LIGHT & WATER CO.

This indenture made this Fourteenth day of April, 1904, by and between the Nevada Power, Light and Water Company, a corporation, duly organized, created and existing under and by virtue of the laws of the State of California, and having its principal place of business in San Francisco, California, the party of the first part, and the Reno Power, Light and Water Company, a corporation, duly organized, created and existing under and by virtue of the laws of the State of California, and having its principal place of business in San Francisco, California, the party of the second part, WITNESSETH:

Whereas, on the Fourth day of April, 1904, a meeting of the stockholders of the said Nevada Power, Light and Water Company duly called and assembled for the purpose of consenting by a vote thereat to the sale, assignment, transfer and conveyance of all of the business, franchises and properties, as a whole, of said Nevada Power, Light and Water Company, was duly convened and held and there were present and represented thereat stockholders of said Nevada Power Light and Water Company, holding of record more than two thirds

of the issue (and also *fo* the subscribed) capital stock of the said Nevada Power Light and Water Company, and

WHEREAS, at said last named meeting a resolution was duly and regularly adopted by an affirmative vote of said stockholders of said *Nevada* Power Light and Water Company, holding of record more than two thirds of the issued (and also of the subscribed) capital stock of said Nevada Power Light and Water Company [40] granting and giving consent that all the business, franchises and properties as a whole of the said Nevada Power Light and Water Company be sold, assigned, transferred, granted and conveyed to said Reno Power, Light and Water Company, for a good and valuable consideration, approved and consented to at said meeting by said vote last mentioned, and

WHEREAS, at a meeting of the Board of Directors of said Nevada Power, Light and Water Company duly called and convened on the Fourth day of April, 1904 a resolution was unanimously adopted authorizing and directing the execution, assignment and delivery by said Nevada Power, Light and Water Company of assignments, transfers, bills of sale, conveyances, and granting of all the business, franchises, and properties as a whole, of said Nevada Power, Light and Water Company to said Reno Power Light and Water Company, and all such other instruments in the premises as may be necessary, proper and convenient and directing and authorizing P. L. Flanigan and W. L. Bechtel, President and Secretary respectively of

said Nevada Power Light and Water Company, to execute, acknowledge and deliver such assignments, transfers, bills of sale, conveyances and grants in the premises in accordance with said resolution so adopted at said stockholders' meeting above referred to.

NOW THEREFORE, in consideration of the premises and the sum of Ten Dollars to the first party by the second party in hand paid and of the consideration aforesaid, the said party of the first part does hereby sell, assign, transfer, convey and grant, unto the said Reno Power, Light and Water Company, its successors and assigns forever, all the business, franchises and properties, as a whole, of the said Nevada Power, Light and Water [41] Company whatsoever the same may be and wheresoever the same may be situated, and under whatsoever title or right the same may be held or claimed and particularly all the following described property, to wit:

I.

The Northwest quarter of the Southwest quarter of Section 2, Township 19 North, Range 19 East, Mount Diablo Base and Meridian, in Washoe County, State of Nevada.

All that certain lot, Piece or parcel of land situated in the Town of Reno, Washoe County, State of Nevada, described as follows:

Beginning at the point on the North line of Fourth Street, distant thereon one hundred and fifty (150) feet easterly from the easterly line of Eureka Avenue, and running thence easterly and along the

North line of Fourth Street to the West line of Alameda Avenue, thence Northerly and along the said west line of Alameda Avenue four hundred and ten (410) feet and six (6) inches to the south line of Fifth Street, thence westerly along the North line of Fifth Street to a point distant thereon

fifty-five (55) feet easterly from the east line of Eureka Avenue, thence southerly to the place of beginning. Being a portion of Block 2 of Morrill's addition to Reno.

III.

All those certain lots numbered thirty-eight (38), thirty-nine (39), forty (40), forty-one (41), forty-two (42), forty-three (43) and forty-four (44), situated, lying and being in the Town of Reno, Washoe County, State of Nevada, and known and designated as River Front lots east from Virginia Street in the Town of Reno, Nevada, on the official map of said County. [42]

IV.

All that certain piece of land situated, lying and being in Washoe County, State of Nevada, described as follows:

Commencing at a point 1.71 chains North from the quarter section corner between Sections 2 and 3, Township 19 North, Range 19 East, Mount Diablo Base and Meridian, and running thence North 61 degrees 45′ west 13.57 chains, thence south 2° 15′ west 17 chains, thence north 73° 30′ East 13.11 chains, thence north 6.84 chains to the place of beginning.

V.

That certain ditch known and designated as the Highland Ditch, on the north side of the Truckee River, heading at or near the Railroad Bridge near Verdi, Washoe County, Nevada, and more particularly described in two instruments recorded in the office of the County Recorder of Washoe County, State of Nevada, the one in Book F of Miscellaneous Records at Page 164 and the other in Book F of Miscellaneous Records at page 569, to which instruments and the records thereof special reference is hereby made.

VI.

That certain ditch and dam known as the Electric Light Ditch and Dam, situated on the north side of the Truckee River in Reno, Washoe County, Nevada, running through the lands of Joseph Frey and Murray Brothers and more particularly described in the certificates of location recorded in Volume F on page 393 of the Miscellaneous Records in the office of the Recorder of Washoe County, State of Nevada, to which instrument and the record thereof special reference is hereby made.

VII.

All that certain lot, piece or parcel of land situated [43] in Washoe County, State of Nevada, beginning at a point south 83° 30′ West (Magnetic variation 17° 30′ East) in —— the northeast quarter of the northeast quarter of Section fifteen (15), distant one hundred and seventy-three (173) feet from the corners of Sections ten (10), eleven (11),

fourteen (14) and fifteen (15), in Township nineteen (19) north, range nineteen (19) East, Mount Diablo Base and Meridian, thence running west three hundred and eleven (311) feet and three (3) inches, thence south one hundred and *sixth* (160) feet, thence east two hundred and thirty-three (233) feet and three (3) inches and thence north twenty-six (26) degrees East one hundred and seventy-eight (178) feet and three (3) inches to the point of beginning.

VIII.

All that certain lot, piece or parcel of land situate in Washoe County, State of Nevada, beginning at the center of the Electric Light Bridge at its intersection with the South Bank of the Truckee River in Lot 2 of Section 15, Township 19 North, Range 19 East, Mount Diablo Base and Meridian, and running thence due South two hundred and sixty three (263) feet, thence North fifty eight and a half (58½) degrees east three hundred and twenty five (325) feet to a mound of stone, thence due North one hundred and twenty five (125) feet to the south bank of the Truckee River, and thence westerly and along the south bank of the said river to the point of beginning.

IX.

The fractional northeast quarter of the southwest Quarter of Section two (2), Township 19 North, Range 19 East, Mount Diablo Base and Meridian.

X. [44]

All that certain piece, lot or parcel of land, situated in Reno, Washoe County, State of Nevada, described at follows, to-wit:

Beginning at a point on the north line of Fourth Street distant thereon one hundred and fifty (150) feet easterly from the easterly line of Eureka Avenue and running thence easterly and along the north line of fourth street to the west line of Alameda Avenue, thence northerly and along the said west line of Alameda Avenue, four hundred and ten (410) feet and six (6) inches to the south line of Fifth Street, thence westerly and along the South line of Fifth Street to a point distant thereon fifty five (55) feet easterly from the east line of Eureka Avenue and thence southerly to the place of beginning.

Being a portion of Block two (2) in Morrill's Addition to the Town of Reno, Washoe County, Nevada, as per official plat or map thereof on file in the office of the County Recorder of Washoe County, Nevada.

XI.

All those certain easements, privileges, rights and interest granted to the party of the first part by J. Gault and particularly described in that certain deed from said J. Gault to the party of the first part, dated February 8th, 1902, and recorded in Volume 22 of Deeds at page 613, Records of Washoe County, Nevada.

XII.

All those certain easements, privileges, rights and interests granted to the party of the first part by James Sullivan and particularly described in that certain deed from [45] said James Sullivan to the party of the first part, dated February 8th, 1902, and recorded in Volume 22 of Deeds at page 613, Records of Washoe County, Nevada.

XIII.

All that certain parcel of land, situated, lying and being in the County of Washoe, State of Nevada, and described as follows, to-wit:

Beginning at point number one (1) whence the quarter section corner between Sections two (2) and three (3) of Township Nineteen (19) North, Range Nineteen (19) East, M. D. B. M. bears south sixty (60°) degrees twenty four (24) minutes East, nine hundred and ten (910) feet; thence south eighty six (86) degrees, fifty (50) minutes west three hundred and sixty (360) feet to a point number two (2), thence south two (2) degrees, forty (40) minutes West one hundred and twenty one (121) feet, six (6) inches to a point number three (3), thence north eighty six (86) degrees fifty (50) minutes east three hundred and sixty (360) feet to a point number four (4), thence north two (2) degrees forty (40) minutes east one hundred and twenty one (121) feet six (6) inches to the place of beginning. Containing one (1) acre and situate in the south east one quarter (¼) of northeast one quarter (¼) of northeast one quarter (¼) of

Section 3, Township Nineteen (19) North, Range Nineteen (19) East, M. D. B. M.

XIV.

That certain lot of land, situated, lying and being in the County of Washoe, State of Nevada and described as follows, to-wit:

Commencing at the center of Section sixteen (16) in [46] Township nineteen (19) North, Range eighteen (18) East, M. D. B. & M. and running thence east on the north line of the south-east quarter of said section 16, eight hundred and eighty five (885) feet to the point of beginning, thence running south at right angles six hundred and sixty (660) feet, thence east at right angles six hundred and sixty (660) feet; thence north at right angles six hundred and sixty (660); thence west at right angles six hundred and sixty (660) feet to the place of beginning, being ten (10) acres of land in North one half (½) of South East one quarter (¼) of said Section 16, Township 19 North, Range 19 East.

XV.

All that certain piece of land, situate, lying and being in the County of Washoe, State of Nevada, and described as follows:

All that piece of land containing thirty (30) acres and situated in the south west one quarter (¼) of the Northeast one quarter (¼) and the North west one quarter (¼) and *of* the south east one quarter (¼) of Section Three (3), Township Nineteen (19) North, Range nineteen (19) East,

M. D. B. M. below the ditch known as "Highland Ditch" and described as follows:

Beginning at a point on the east bank of the said Highland Ditch, from which the quarter section corner on the north boundary of Section 3 Township 19N., Range 19 E., bears North 14° 57′ West, distant 1603, feet thence running south 22° 54′ west along the east bank of said "Highland Ditch" 487.2 feet, thence south 35° 10′ west 118.7 feet; thence south 41° 57′ west 231.5 feet to a point on the bank of said ditch at the intersection with the west boundary of the east half of said section three; thence south and [47] along said west boundary line 897.2 feet thence at a right angle east 917 feet; thence at a right angle north 1615.21 feet, thence at a *at a* right angle west 504.3 feet to the place of beginning.

Also, a right of way for a pipe line, to be laid two feet under ground from the south boundary of the land herein*febo*re described to the limits of the said City of Reno, also the right of way for a pipe line from the reservoir now situated in the land hereinbefore described to the present reservoir of said Nevada Power Light and Water Company, also, a right of way for a waste water ditch from the land hereinbefore described.

XVI.

All that certain piece of land situated, lying and being in the County of Washoe, State of Nevada, and being described as follows, to-wit:

All that portion of the southwest one quarter

(¼) of the south east one quarter (¼) of Section nine (9), Township nineteen (19) North, range eighteen (18) east, M. D. B. M. lying south of the Truckee River.

Also, all buildings, superstructures, machinery and apparatus for generating and distributing electric current or for making and distributing illuminating or fuel gas, poles, wires, mains, lamps, motors and lighting and distributing apparatus for electric lights, gas mains and pipes, lamp posts, meter fixtures and other lighting and distributing apparatus for electric light, reservoirs, pipes, aqueducts, flumes, ditches, mains, service pipes, holders, franchises, easements, rights of way, things in action, stocks, bonds or other securities, contracts, claims and demands of the Power Company whether now owned or hereafter to be acquired by it together with all and singular the tenements, [48] hereditaments, and appurtenances thereunto belonging, or in any wise appertaining and the reversion and reversions, remainder and remainders, rents, issues, profits, income, earnings, privileges, immunities and things incorporeal or otherwise growing out of or appertaining to said property of the said Power Company, and al*os* all the estate, interest and claim whatsoever in law as well as in equity which the said Power Company has in and to the premises or any part thereof, hereby conveyed unto the said Trustee, its successors and assigns, and the full power on the part of the Trustee, so far as it lawful*l* may, to succeed to and enjoy all the rights, privileges, immunities

and things corporate and otherwise of said Power Company.

And also all assets, contracts, franchises, privileges, properties, real, personal and mixed, business and good will as a whole, of every kind, name and nature, belonging to the party of the first part at this date, or in which it may have any right, title, or interest whether the same is herein particularly described or not, or which it may hereafter acquire, or whether the same is held by third persons or other corporations in trust or otherwise for the party of the first part, or not.

It being understood and agreed that the properties hereby conveyed are subject to a bonded indebtedness of $300,000.00 which the said party of the second part assumes and agrees to pay and discharge together with all the obligations and liabilities of the said party of the first part.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. [49]

To have and to hold, all and singular the said premises and all of the said property, real, personal and mixed, rights, privileges and franchises, together with the appurtenances unto the said party of the second part and to its successors and assigns forever.

IN WITNESS WHEREOF, the said party of the first part has caused these presents to be exe-

cuted by its officers thereunto duly authorized, and the seal of this corporation to be affixed the day and year first herein above written.

NEVADA POWER, LIGHT AND WATER COMPANY.

(Corporate Seal) By P. L. FLANIGAN, Pres.

By W. L. BECHTEL, Sec.

State of California,
City and County of San Francisco,—ss.

On this 14th day of April, A. D. one thousand nine hundred and four, before me, D. B. Richards, a Notary Public in and for said City and County and State residing therein, duly commissioned and sworn, personally appeared P. L. Flanigan, known to me to be the President, and W. L. Becktel, known to me to be the Secretary of the Nevada Power, Light and Water Co., the corporation described in, and whose name is subscribed to the within and annexed instrument, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and official seal, the day and year in this certificate first above [50] written.

(Seal) D. B. RICHARDS,

Notary Public in and for said City and County of San Francisco, State of California, 14 Sansome Street.

Recorded at the request of W. L. Bechtel. Filed Apl. 19, A. D. 1904, at 35 mins. past 10 o'clock A. M.

C. H. STODDARD,
County Recorder.

A. C. C. Verified.
25–162 et seq.

State of Nevada,
County of Washoe,—ss.

I, C. H. Stoddard, County Recorder in and for said Washoe County, Nevada, do hereby certify the foregoing (consisting of ten pages) to be a full, true and correct copy of the record of the deed from Nevada Power, Light and Water Company, to Reno Power, Light and Water Company, which was filed for record in my office April 19th, 1904, at 10:35 o'clock A. M., and is recorded in Book "25" of Deeds, at page 162 thereof, Records of Washoe County, Nevada.

Witness my hand and Official Seal at my office in the City of Reno, this 15th day of February, A. D. 1912.

(Seal) C. H. STODDARD,
County Recorder.

[Endorsed]: No. G.–29. U. S. District Court, Nevada. Sierra Pacific Power Co., Plaintiff, vs. City of Reno et al., Defendant. Plffs. Exhibit *No.* "F." Filed Apr. 24, 1930. E. O. Patterson, Clerk. By O. E. Benham, Deputy Clerk. [51]

PLAINTIFF'S EXHIBIT "G."

DEED OF CONVEYANCE.

THIS INDENTURE made this 30th day of June, 1922, by and between Reno Power, Light and Water Company, a corporation organized and existing under and by virtue of the laws of the State of California, (party of the first part), and The Truckee River General Electric Company, a corporation organized and existing under and by virtue of the laws of the State of Maine (party of the second part).

WITNESSETH:

The party of the first part, for and in consideration of ten dollars ($10) and other valuable considerations, the receipt of which is hereby acknowledged, does by these presents grant, bargain and sell unto the party of the second part, its successors and assigns forever, all property, real and personal, franchises and assets now owned or to which the said party of the first part is now or may at any time hereafter become entitled, including particularly, but without restricting the generality of the foregoing grant, the following described property situated in Washoe County, Nevada, and more particularly described as follows:

1. 1.10 A. out of Lot 2 in NW.¼ of Sec. 15, Tp. 19 N., R. 19 E., Described as beginning at the center of the South end of the Electric Light Bridge over the Truckee River, thence due South 263 ft.; thence N. 67° 57′ E. 518.67

ft.; thence due N. 125 ft. to the South Bank of River; thence W. to point of beginning, West 30 ft. reserved for roadway.

2. Part of Lot 6 of Sec. 10, Tp. 19 N., R. 19 E. described as beginning at the SE. corner of Sec. 10; thence W. 225 ft.; thence n to Truckee River; thence easterly along South bank to E. line of Sec. 10; thence S. to beginning.

3. Part of Lot 6 of Sec. 10, Tp. 19 N., R. 19 E. described as beginning on the S. line of Sec. 10, 965 ft. 6 in. W. from SE. corner; [52] thence N. 8° E. 58 ft. N. 85° 30′ E. 312 ft., N. 76 E. 130 ft. to Truckee River; thence E. along River bank 67 ft. S. 76° W. 193 ft.; S. 85° 30′ W. 194 ft.; S. 8° W. 33 ft. to South line of section, W. 25 ft. to beginning.

4. 1.131 A. out of Frac. part NE.¼ of Sec. 15, Tp. 19 N., R. 19 E. described as beginning at corner No. 1, a monument on Sec. line between 10 and 15, whence the section corner common to Secs. 10, 11, 14 and 15, Tp., 19 N., Range 19 E., bears N. 87° 58′ E. 101.10 ft.; running thence S. 87° 58′ W. 34.90 ft. to a monument for corner; thence S. 29° 25′ W. 5.91 ft. to a monument for corner; thence S. 85° 07′ W. 340.34 ft. to a monument for corner; thence S. 0° 25′ E. 138.70 ft. to a monument for corner; thence N. 88° 54′ E. 282.84 ft. to a monument for corner;

thence N. 28° 53′ E. 192.72 ft. to a point of beginning.

5. A portion of Sec. 15, Tp. 19 N., R. 19 E. described as follows: "Beginning at corner No. 1, identical with the NW. corner of Reno sub-station property, whence section corner, common to Secs. 10, 11, 14 and 15, Tp. 19 N., Range 19 E., bears N. 85° 21′ E. 479.5 ft.; thence S. 87° 29′ W. 393.60 ft. to a monument; thence N. 0° 27′ W. 5 ft. to a monument near the NE. corner of penstock regulator; thence S. 88° 27′ W. 68 ft. to a monument for corner; thence N. 2° 02′ W. 19.80 ft. to a monument on said line between sections 10 and 15, from which corner common to Secs. 10, 11, 14 and 15 bears N. 87° 58′ E. 940.50 ft. distant; thence S. 87° 58′ W. along said section line 59.95 ft. to a monument for corner; thence S. 2° 0′ E. 14 ft. to a monument for corner; thence S. 87° 56′ W. 131.33 ft. to a monument for corner near west end of the North Spillway; thence S. 79° 35′ W. 127.57 ft. to a mounment for a corner on N. line of the land occupied by the flume of the party of the first part; thence along said north line of the land occupied by the flume; S. 72° 25′ W. 25.92 ft.; thence S. 69° 46′ W. 25.89 ft.; thence S. 66° 23′ W. 25.92 ft.; thence S. 63° 21′ W. 25.65 ft.; thence S. 61° 59′ W. 25.39 ft.; thence S. 60° 42′ W. 25.40 ft.; thence S. 59° 16′ W. 25.39 ft.; thence

S. 58° 04′ W. 25.32 ft.; thence S. 57° 08′ W. 25.41 ft.; thence S. 55° 16′ W. 25.34 ft.; thence S. 54° 49′ W. 25.20 ft.; thence S. 53° 54′ W. 25.22 ft.; thence to a monument; thence S. 53° 20′ W. 90.27 ft. to a monument; thence S. 52° 11½′ W. 80.31 ft. to a monument; thence S. 51° 23′ W. 374.52 ft. to a monument; thence S. 51° 50½′ W. 149.62 ft. to a monument which is placed 120 ft. more or less northeasterly from the southwest end of the flume of the party of the first part, leading from its ditch to its penstock; thence N. 87° 58′ E. along said boundary line 28.86 ft. to a monument on the south of the land occupied by said flume; thence along south line of the land occupied by said [53] flume N. 51° 56′ E. 126.17 ft. to a monument for corner; thence N. 51° 23′ E. 374.50 ft. to a monument for corner; thence N. 52° 11½′ E. 80.02 ft. to a monument; thence N. 53° 13′ E. 90 ft. to a monument for corner; thence N. 53° 54′ E. 25 fts.; thence N. 54° 49′ E. 25 ft.; thence N. 55° 16′ E. 25 ft.; thence N. 57° 08′ E. 25 ft.; thence N. 58° 04′ E. 25 ft.; thence N. 59° 16′ E. 25 ft.; thence N. 60° 42′ E. 25 ft.; thence N. 61° 59′ E. 25 ft.; thence N. 63° 21′ E. 25 ft.; thence N. 66° 23′ E. 25 ft.; thence N. 69° 46′ E. 25 ft.; thence N. 72° 25′ E. 25 ft. to a monument for corner; thence N. 86° 58′ E. 253.63 ft. to a monument for corner; thence S.

82° 05′ E. 51.17 ft. to a monument for corner; thence N. 1° 25′ W. 6 ft. to a monument for corner near the SW. corner of the penstock regulator; thence N. 89° 20′ E. 59.99 ft. to a monument for corner, near the SE. corner of the penstock regulator; thence N. 0° 27′ W. 5 ft. to a monument for corner; thence N. 87° 30′ E. 410.20 ft. to a monument for corner on the south side of pipe line, and on the west boundary line of the Reno sub-station property; thence N. 0° 25′ W. 18.75 ft. to the point of beginning."

6. 30 A. out of the SW.¼ of NE.¼ of NW.¼ of SE.¼ of Sec. 3, Tp. 19 N. R. 19 E. described as beginning at the E. bank of the Highland Ditch at a point which is S. 140° 57′ E. 1603 ft. from the quarter corner on the N. line of Sec. 3; thence southwesterly along said ditch to the center N. and S. line of said Sec. 3; thence S. 897 ft. 2 in. E. 917 ft., N. 1615.21 ft., westerly 504 ft. 2 in. to point of beginning.

Excepting, however, from this conveyance and the operation thereof, ten acres sold or conveyed by the party of the first part to H. J. Pratt by deed dated May 1, 1919, and described as follows:

"Beginning at a point on the West boundary of the East half of Sec. 3, Tp. 19 N., R. 19 E., which point is distant 2283.6 ft. along the quarter section line south from the quarter

section corner on the North boundary of Sec. 3, Tp. 19 N. R. 19 E., thence running south along said West boundary line 880.4 ft., thence at a right angle East 419.2 ft., thence at a right angle North 776.3 ft., thence at a right angle West 3.36 ft., thence at a right angle north 289.6 ft., thence North 75° 41′ West 214.7 ft., thence South 29° 48′ West 52 ft., thence South 43° 9′ West 269.9 ft. to point of beginning, containing ten (10) acres, more or less; but excepting therefrom that certain irrigation ditch of an approximate capacity of seven cubic feet of water per second extending to the irrigation reservoir of the J. N. Evans Estate Company and the right of way for said ditch and the right to enter upon said parcel of land for the purpose of maintaining said ditch." [54]

7. 1 acre out of the SE.¼ of NE.¼ of Sec. 3, Tp. 19 N., R. 19 E. described as beginning at a point N. 60° 24′ W. 910 ft. from the quarter section corner between sections 2 and 3; thence S. 86° 50′ W. 360 ft. S. 2° 40′ W. 121 ft. 6 in. N. 86° 50′ E. 360 ft. N. 2° 40′ E. 121 ft. 6 in. to point of beginning.

8. 13.80 A. out of the E.½ of Sec. 3, Tp. 19 N., R. 19 E. used for Highland Ditch Reservoir and described as beginning 1.71 chains N. of the SE. corner of NE.¼ of Sec. 3; thence N. 61° 45′ W. 13.57 chains S. 2° 15′ W. 17

chains N. 73° 30′ E. 13.11 chains N. 6.84 chains to point of beginning.

9. 10 A. out of the N.½ of SE.¼ of Sec. 16, Tp. 19 N., R. 18 E., and described as commencing at the center of Sec. 16, Tp. 19 N., R. 18 E., M. D. B. & M., and running thence east on the North line of the SE.¼ of said Sec. 16, 885 ft. to the point of beginning; thence running south at right angles 660 ft.; thence running east at right angles 660 ft., thence running north at right angles 660 ft.; thence running west at right angles 660 ft to the place of beginning.

10. 3 A. more of less out of SW.¼ of SE.¼ of Sec. 9, Tp. 19 N., R. 18 E., all lying south of the Truckee River.

The above described parcels of land, numbered 1 to 10 inclusive, were conveyed to Reno Power, Light and Water Company, party of the first part herein, by deed of the Nevada Power, Light & Water Company, dated April 14, 1904 and recorded in Volume 25 of Deeds, at page 162, Records of Washoe County, Nevada, and as to parcels numbered 4 and 5 above also by corrective and confirmatory deed of Samuel Murray and wife, dated September 15, 1910, and recorded in Volume 38 of Deeds at page 312, Records of Washoe County, Nevada.

11. 115 A. more or less of the NE.¼ of Sec. 16, Tp. 19 N., R. 18 E., described as beginning at the section corner common to Secs. 9, 10, 15 and 16, Tp. 19 N., R. 18 E., and running thence

along the section line between Secs. 9 and 16, N. 88° 54′ W. 1640.8 ft.; thence S. 12° 52′ W. 76.47 ft.; thence S. 71° 13′ W. 208.56 ft.; thence S. 24° 14′ W. 362.34 ft.; thence S. 40° 55′ W. 495.0 ft.; thence S. 7° 24′ E. 514.8 ft.; thence S. 26° 30′ E. 1342.54 ft.; thence S. 88° 03′ E. 1584.59 ft. to the quarter corner between Secs. 15 and 16; thence N. 1° 45′ E. 2581.78 ft. to the point of beginning and being a fractional part of the NE.¼ of Sec. 16, Tp. 19 N., R. 18 E. Excepting therefrom 9.963 A. conveyed on April 30, 1915, to Central Pacific Railway Company and subject [55] to an easement of the same date to the above Company for right of way across a portion of the property described.

12. 3 A. more or less out of the NE.¼ of SE.¼ of Sec. 16, Tp. 19 N., R. 18 E., described as bounded on the N. by the flume of the Washoe Power & Development Company and on the E. by the Section line between Secs. 15 and 16, Tp. 19 N., R. 18 E., on the S. by a line 3 ft. southerly of a drainage ditch and on the W. by the land of the Reno Power, Light and Water Company.

13. A parcel of land beginning at a point in the center of the Truckee River, which point is 670 ft. more or less N. of the Section line between Secs. 14 and 23, Tp. 19 N., R. 18 E., and 455 ft. more or less E. of the Section line between Secs. 14 and 15, Tp. 19 N., R. 18 E., and running thence southerly 29° 55′ W. 500

ft.; thence S. 82° 55′ E. 200 ft.; thence N. 35° 19′ E. 181.66 ft.; thence S. 88° 18′ E. 328.5 ft.; thence N. 61° 4′ E. 74 ft.; thence N. 32° 16′ E. 396 feet; thence N. 51° E. 32.5 ft.; thence N. 10° 2′ W. 138 ft. to center rail post on E. side of the Washoe Power & Development Company's bridge across the Truckee River; thence in a southerly direction on the center line of the Truckee River, a distance of 690 ft. more or less to point of beginning, containing 6.8 A. more or less.

14. The fractional part of Lot 12 and the fractional part of the south half of Lot 11, Block "W" of Reno, which lie north of Mill Ditch.

15. Lots 17 and 18, Block 9 of Robinson's Addition to Sparks.

16. An easement for right of way 75 ft. in width for Washoe Power Ditch across S.½ of Sec. 15 and S.¼ of Sec. 14, Tp. 19 N., R. 18 E., the center line of which begins at a point on Section line common to Secs. 15 and 16, 402.7 ft. S. from quarter corner between Secs. 15 and 16; thence on center line S. 49° 25′ E. 452.05 ft.; thence S. 57° 12′ E. 197.74 ft.; thence S. 40° 40′ E. 469.49 ft.; thence S. 59° 26′ E. 364.94 ft.; thence S. 51° 27′ E. 238.68 ft.; thence S. 68° 49′ E. 136.46 ft.; thence S. 37° 45′ E. 321.32 ft.; thence S. 59° 23′ E. 326.90 ft.; thence N. 88° 7′ E. 79.77 ft.; thence N. 54° 49.5′ E. 247.57 ft.; thence N. 65° 8′ E. 342.65 ft.; thence S. 82° 30′ E. 113.07 ft.; thence S. 65° 24.5′ E. 448.26 ft.;

thence S. 35° 3′ E. 790.04 ft.; thence S. 50° 10′ E. 214.40 ft.; thence S. 62° 45′ E. 116.17 ft.; thence S. 86° 6′ E. 256.19 ft.; thence N. 79° 38′ E. 1346.90 ft.; thence N. 72° 54′ E. 199.94 ft.; to penstock of Washoe Power Plant. [56]

17. An easement for right of way 75 ft. in width for flume line across NE.¼ of SE.¼ of Sec. 16, Tp. 19 N., R. 18 E., the center line of which commences at a point on E. side line of Sec. 16, about 460 ft. S. of quarter section corner between Secs. 15 and 16; running thence toward NW. corner of said NE.¼ of SE.¼ about 1000 ft. to boundary of E. side of lands of Reno Power, Light and Water Company.

The above described parcels of land and easements, numbered 11 to 17, inclusive, were conveyed to Reno Power, Light and Water Company, party of the first part herein, by deed of the Washoe Power & Development Company, dated July 19, 1915, and recorded in volume 46 of Deeds at page 259, Records of Washoe County, Nevada.

18. All of Block 3 of Morrill's Addition to Reno, acquired by the party of the first part herein from P. L. Flanigan by warranty deed dated November 24, 1905, and recorded in Volume 27 of Deeds at page 602, Records of Washoe County, Nevada.

19. Part of SW.¼ of NE.¼ and SE.¼ of NW.¼ of Sec. 12, Tp. 19 N., R. 19 E. described as follows: "Beginning at a point on the high

water line on the north bank of the Truckee River 355 ft. more or less east of the center line of the new Cattle Bridge, Reno, Nevada, and measured along the water's edge, said point being at the intersection of the southerly boundary of the Central Pacific Railroad Company's right of way and the high water line on the North bank of the River; thence along the southerly boundary of the Central Pacific Railroad Company's right of way 150 ft. more or less, measured in an easterly direction to a point on the south bank of the Sullivan and Kelley Ditch; thence along the south bank of said Sullivan and Kelley Ditch 40 ft. to a point on the south bank of said ditch; thence along the south bank of said ditch N. 83° 20½′ E. 165 ft. to a point; thence N. 88° 28½′ E. 342.7 ft. to a point 40 ft. north more or less of the south bank of the Old Power Ditch; thence N. 82° 37½′ E. 686 ft. to a point opposite the end of the Old Power Ditch 40 ft. north more or less from the south bank of the said ditch; thence N. 84° 26½′ E. 329.8 ft. to a point in center and at end of old stone wall, 120 ft. more or less from the water's edge; thence N. 86° 23½′ E. 330 ft. more or less to North and South boundary line between land acquired from Taylor and Fulton by the Reno Brewing Company, Incorporated, and that land formerly owned by the Crystal Ice and Cold Storage Com-

pany; thence along this boundary line 100 ft. more or less measured [57] in a southerly direction to the high water line of the north bank of the Truckee River; thence along the high water line on the north bank of the Truckee River to the point of beginning."

Acquired by the party of the first part herein from Reno Brewing Company by warranty deed dated June 2, 1910, and recorded in Volume 37 of Deeds at page 488, Records of Washoe County, Nevada.

20. 0.17 A. out of SW.¼ of NW.¼ of Sec. 12, Tp. 19 N., R. 19 E. described as beginning at a point on the high water line of the south bank of the Truckee River S. 89° 07′ E. 125 ft. from a point on the center line of the New Cattle Bridge; thence N. 73° 23′ E. 108 ft. more or less along the high water line to a point in line with a fence running in a northerly and southerly direction; thence S. 0° 42′ E. 83.5 ft. to a point on the fence line; thence S. 88° 51′ W. 105 ft. to a point; thence N. 0° 07′ W. 53.5 ft. more or less to point of beginning.

Acquired by the party of the first part herein from Reno Brewing Company by warranty deed dated June 2, 1910, and recorded in Book 37 of Deeds at page 488, Records of Washoe County, Nevada.

21. The NW.¼ of SW.¼ and SW.¼ of NW.¼ of Sec. 36, Tp. 20 N., R. 19 E. containing

80 A. more or less, acquired by the party of the first part herein from G. A. Campbell by warranty deed dated August 23, 1911.

22. NW.¼ of NE.¼, N.½ of NW.¼ and SE.¼ of NW.¼ of Sec. 36, Tp. 20 N., R. 19 E. containing 160 A. more or less, acquired by the party of the first part herein from P. L. Flanigan by warranty deed dated November 24, 1905, and recorded in Volume 27 of Deeds, at page 602, Records of Washoe County, Nevada.

23. Filter plant site consisting of 0.37 A. more or less in S.½ of NE.¼ of Sec. 3, Tp. 19 N., R. 19 E. described as beginning at a point N. 74° W. 1363 ft. from quarter corner common to Secs. 2 and 3; said corner being located just E. of Highland Reservoir on boundary to City of Reno (also said point of beginning is N. 37° 57′ W. 2133 ft. from ⅛ corner next S. from above quarter corner and common to Secs. 2 and 3 on boundary to City of Reno); running thence N. 100 ft.; thence E. 160 ft.; thence S. 100 ft.; thence W. 160 ft. to point of beginning.

Conveyed to the party of the first part herein from G. A. Campbell by deed dated July 7, 1915, and recorded in Vol. 46 of Deeds, at page 236, Records of Washoe County, Nevada.

24. An unused right of way across a portion of Sec. 6, Tp. 19 N., R. 20 E., described as beginning at the water tank site located on

Block 4 and extending easterly across a portion of Block 4 and E. along or near the center of Overland Street to and across [58] Block 7 to W. line of Sec. 5, a distance of 1700 ft. more or less, intersecting section line between Secs. 5 and 6 at an angle of 90° and distant 170 ft. N. of SW. corner of Sec. 5.

Rights of Washoe Deep Well Water Company conveyed to the party of the first part therein by quitclaim deed dated July 19, 1915, and recorded in Vol. 46 of Deeds, at page 257, Records of Washoe County, Nevada.

25. A strip of land 40 ft. in width, extending along the extreme S. side of the NE.¼ of the SW.¼ of Sec. 2, T. 19 N., R. 19 E., M. D. M., the said strip beginning on the western boundary line of said 40 A. tract, extending E. to, stopping at, and intersecting the "Long Valley Wagon Road," or what is now known as North Sierra Street, acquired by the party of the first part herein from the J. N. Evans Estate Company by deed dated August 11, 1920, and recorded in Volume 56 of Deeds, at page 369, Records of Washoe County, Nevada.

Also all buildings, superstructures, machinery and apparatus for generating and distributing electric current or for making and distributing illuminating or fuel gas, poles, wires, mains, lamps, motors and lighting and distributing apparatus for electric lights, gas mains and pipes, lamp posts, meter fixtures and other lighting and distributing

apparatus for electric light, reservoirs, pipes, acqueducts, flumes, ditches, mains, service pipes, holders, franchises, easements, rights of way, things in action, stocks, bonds or other securities, contracts, claims and demands of the party of the first part whether now owned or hereafter to be acquired by it, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining and the reversion and reversions, remainder and remainders, rents, issues, profits, income, earnings, privileges, immunities and things incorporeal or otherwise growing out of or appertaining to said property of the said party of the first part, and also all the estate, interest and claim whatsoever in law as well as in equity [59] which the said party of the first part has in and to the premises or any part thereof hereby conveyed unto the said party of the second part, its successors and assigns, and the full power on the part of the party of the second part, so far as it lawfully may, to succeed to and enjoy all the rights, privileges, immunities and things corporate and otherwise of said party of the first part.

The properties or portions thereof, hereinabove described and hereby conveyed, or intended to be conveyed, are subject, but only in so far as the same may, by the terms thereof attach thereto, to the liens and provisions of the two following described mortgages:

1. First Mortgage given by Nevada Power, Light and Water Company to Mercantile Trust Company, San Francisco, California, dated

April 1, 1902, and recorded in Book Q of Real Mortgages, at page 161, Records of Washoe County, Nevada.

2. First Consolidated Mortgage given by Reno Power, Light and Water Company to Mercantile Trust Company, San Francisco, California, dated July 1, 1904, and recorded in Volume O of Real Mortgages, at page 574, Records of Washoe County, Nevada.

TO HAVE AND TO HOLD all and singular the said premises and all of the said property, real, personal and mixed, rights, privileges and franchises, together with the appurtenances unto the said party of the second part and to its successors and assigns forever, subject, however, to the mortgage encumbrances above set forth.

IN WITNESS WHEREOF the said party of the first part has caused these presents to be executed by its officers thereunto duly authorized, and its corporate seal [60] to be hereto affixed the day and year first hereinabove written.

RENO POWER, LIGHT AND WATER COMPANY.

By EDWARD T. STEEL,
Vice-President.

(Seal) Attest: WILLIAM T. CRAWFORD,
Assistant Secretary.

Commonwealth of Massachusetts,
County of Suffolk,—ss.

This 30th day of June, A. D. 1922, before me, Ernest I. Doe, a Notary Public in and for said County and Commonwealth, duly commissioned and sworn, personally appeared Edward T. Steel, known to me to be a Vice-President and William T. Crawford, known to me to be an Assistant Secretary of Reno Power, Light and Water Company, the corporation described in and whose name is subscribed to the within and annexed instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF I have hereunto set my hand [61] and official seal the day and year in this certificate first above written.

(Seal) ERNEST I. DOE,
Notary Public in and for the Commonwealth of Massachusetts, Residing in Waltham.

My commission expires July 5, 1923.

Form approved.

J. C. JEWETT,
JHO.

THE COMMONWEALTH OF MASSACHUSETTS.

Office of Secretary.

Boston, June 30, 1922.

I HEREBY CERTIFY, That at the date of the attestation hereto annexed, Ernest I. Doe, whose

name is signed to the attached certificate of acknowledgment, proof or affidavit, was at the time of taking the same, a notary public for the said Commonmonwealth duly commissioned and constituted; that to his acts and attestations, as such, full faith and credit are and ought to be given in and out of court; that as such notary public, he is by law authorized to administer oaths and take acknowledgments of deeds or conveyances of lands, tenements or hereditaments and other instruments throughout the Commonwealth to be recorded according to law; and that I verily believe his signature to the annexed attestation to be genuine.

IN TESTIMONY OF WHICH, I have hereunto affixed the Great Seal of the Commonwealth the date above written.

(Seal) F. W. COOK,
Secretary of the Commonwealth. [62]

[Endorsed]: No. 25,829. Filed for Record at Request of Geo. A. Campbell, July 7, 1922, at 35 minutes past 3 o'clock P. M. Recorded in Book 61 of Deeds, page 170, Records of Washoe County, Nevada. Delle B. Boyd, County Recorder. By ————, Deputy. Indexed. Verified.

[Endorsed]: No. G.–29. U. S. District Court, Nevada. Sierra Pacific Power Company, Plaintiff, vs. City of Reno et al., Defendant. Plff. Exhibit *No.* "G." Filed April 24, 1930. E. O. Patterson, Clerk. By O. E. Benham, Deputy Clerk.

(Documentary stamps totaling $1,707.50, affixed thereto.) [63]

[Title of Cause.]

MINUTES OF COURT—MAY 5, 1930—MEMORANDUM DECISION AND ORDERS DENYING MOTION TO DISMISS COMPLAINT AND GRANTING PRELIMINARY INJUNCTION.

Plaintiff's application for a preliminary injunction and defendants' motion to dismiss the complaint and to dissolve the temporary restraining order heretofore issued, having heretofore been heard, argued and submitted to the Court, on this day the Court handed down and filed the following decision and orders (see memorandum decision and orders denying motion to dismiss complaint and granting preliminary injunction on page 65). [64]

Filed May 5, 1930. E. O. Patterson, Clerk. By ————, Deputy.

[Title of Court and Cause.]

MEMORANDUM DECISION AND ORDERS DENYING MOTION TO DISMISS COMPLAINT AND GRANTING PRELIMINARY INJUNCTION.

Plaintiff's application for a preliminary injunction and defendants' motion to dismiss the complaint and to dissolve the temporary restraining

order heretofore issued, having been submitted to the Court for decision, and it appearing from the allegations in the complaint that the meters installed and in process of installation by plaintiff in or in connection with the water mains or water system of the City of Reno have not been and are not being installed for the purpose of fixing charges against the users and consumers of plaintiff in the City of Reno, but for other purposes, and the Court being [65] fully advised in the premises,—

IT IS ORDERED that defendants' motion to dismiss be, and the same hereby is, denied, and that defendants have twenty days in which to answer.

IT IS FURTHER ORDERED that plaintiff's motion to continue the restraining order heretofore issued as an injunction *pendente lite,* be, and the same hereby is, granted, to the extent only of enjoining defendants until the trial and determination of this cause, or until the further order of this Court, from doing or causing to be done any of the alleged threatened acts mentioned in Paragraph V of plaintiff's complaint. The Court upon notice, and good cause shown, reserves power to modify this order in respect to preliminary injunction in any particular.

Dated this 5th day of May, 1930.

FRANK H. NORCROSS,
District Judge. [66]

Filed May 24, 1930. E. O. Patterson, Clerk. By O. E. Benham, Deputy.

[Title of Court and Cause.]

ANSWER.

Now come the above-named defendants by Le Roy Pike, as city attorney of defendant, City of Reno, a municipal corporation, their attorney, and by Sardis Summerfield as their solicitor, and answering plaintiff's complaint in the above-entitled action, admit, deny and allege as follows, to wit:

I.

Admit the truth of the allegations contained in Paragraph I of plaintiff's complaint.

II.

Admit the truth of the allegations contained in Paragraph II of plaintiff's complaint. [67]

III.

Deny that plaintiff is now, or that it or its predecessors in interest for many years last past or at any time at all ever have been engaged in selling water to the inhabitants of the cities of Reno and Sparks, or either or any thereof, or to the said cities, or either thereof, and deny that plaintiff now owns, or at any time has ever owned any water. Deny that plaintiff or its predecessors in interest in the conduct of its or their business in serving and distributing water to the cities of Reno and Sparks and to their inhabitants, or to either of any thereof, has or ever have at any time acted under or by virtue of any franchise or franchises. Deny that

plaintiff or its predecessors in interest, or either thereof, have for more than twenty years last past, or for any period of time, or at all, in the operation or maintenance of its, or their, plant or pipe-lines or mains or services, has or have used the streets or alleys of defendant, City of Reno, or has or have installed or maintained under said streets and alleys various, or sundry, or other apparatus or equipment save and except water conveyance pipes.

IV.

Deny that the foundations and water meters which have been installed by plaintiff within the City of Reno have been installed for other purpose or purposes than that of measuring the amount of water passing through its mains or pipes and delivered to individual consumers thereof. Deny upon information and belief that at any time during the summer of 1929 any draught upon plaintiff's reservoirs attained a maximum of fourteen million gallons daily and deny that any such draught during the winter of 1929 and 1930 equaled a minimum of from [68] seven to nine million gallons daily and further particularly deny upon information and belief that at any time during the years of 1929 and 1930 the entire draught of water from the reservoirs of plaintiff was delivered to the cities of Reno and Sparks and to the inhabitants thereof or to all, any or either thereof. Deny that there is a large or unnecessary waste of water within the City of Reno by the users or consumers of water delivered therein by plaintiff. Deny that plaintiff can deter-

mine the waste of water, or the extent thereof, or the person, or the consumers, or the classes of consumers responsible for water wastage only by the installation of meters. Deny that for the purpose of determining the source or cause of any leakage from the mains or services of plaintiff it is necessary to install water quantity measurement meters. Deny that for plaintiff to determine at any time what is or should be a reasonable or normal use of water by consumers within the City of Reno it is necessary to install therein water quantity measurement meters and deny that such meters are necessary to enable plaintiff to detect or identify wasteful water users therein if any there be. Deny that in order for plaintiff to determine whether or not certain or any individual consumers or users of water within the City of Reno are wasteful the installation of water quantity measuring meters is or has been necessary. Deny that to enable plaintiff at any time to classify the water consumers within the City of Reno for the purpose of fixing or determining its service rate charges to its classified water users therein it is or has been necessary to install within said city water quantity measuring meters. Deny that in order to enable plaintiff to ascertain the quantity of water necessary for use in the City of Reno, or to enable [69] it at any time to provide additional water for any increased population in said city it is necessary to install water quantity measuring meters. Deny that any meters heretofore installed by plaintiff or by it intended hereafter to be installed within the City of Reno have

been, or will be, installed for any other purpose than to measure the quantity of water by it delivered to the users thereof within said city and deny that said meters or either thereof will be used, other than incidentally if at all, as check meters or as the sources of informational data. Deny that the meters heretofore installed, or those intended to be installed by plaintiff for the purpose of supplying it with data upon which it will base a schedule of rate service charges against the users of the water by it delivered within the said city. Deny that the foundations for and the meters thereon heretofore installed and hereafter intended to be installed by plaintiff do not or will not constitute obstructions in and upon the streets and alleys of the City of Reno and deny that they will not obstrict or interfere with the use thereof by said city and of its inhabitants and of the public generally.

V.

Admit the truth of the contents of Paragraph V of plaintiff's complaint.

VI.

Deny that defendants, or either thereof, at any time have threatened to, or will, unless restrained therefrom, destroy any meter or meter foundation installed or to be installed by plaintiff in or upon the streets or alleys of the City of Reno and deny that they or either thereof have at any time, or will, unless restrained therefrom, destroy, any appliances or apparatus [70] belonging to plaintiff and deny that they, or either thereof, at any time have threat-

ened to or will, if unrestrained therefrom, obstruct or prevent plaintiff from installing in or upon the streets and alleys of the City of Reno such appliances and apparatus as it may desire other than meters or mechanical devices which will measure the quantity of water which plaintiff will deliver to water users within the City of Reno or which will constitute an obstruction to, or interference with, the lawful use of the said streets and alleys by the City of Reno in the interest and general welfare of the inhabitants of said city and of the general public. Deny that the exercise of the equitable powers of this court, or any other court of equity jurisdiction over the subject matter of this action, is necessary to protect plaintiff from any obstruction to, or interference with, any of its alleged rights as detailed in its complaint or from any threat made or act contemplated by defendants, or either thereof. Deny that any act done or threatened to be done, by defendants, or either thereof, as alleged in plaintiff's complaint, constitute, or would constitute, an irreparable damage or injury to plaintiff. Deny that unless restrained or enjoined therefrom defendants, or either thereof, will unlawfully or without right remove from the streets and alleys of the City of Reno any meter or meter foundation thereon or therein.

VII.

Deny that plaintiff's remedy, if any it has, cannot be had in the ordinary course of law.

VIII.

Wherefore defendants pray that they and each of them be hence dismissed with judgment and decree in their favor and against plaintiff and for all other relief meet and equitable in the premises. [71]

And now again come defendants by Le Roy F. Pike and Sardis Summerfield as their attorney and as their solicitor and for the first counterclaim against plaintiff alleges and shows to the Court as follows, to wit:

1.

Admit the truth of the allegations contained in Paragraph I and II of plaintiff's complaint.

2.

Allege that defendant now is, and for more than ten years last past has been, a city of more than ten thousand population and as such ever since has been, and now is, subject to the provisions and requirements of that certain statute of the State of Nevada entitled "An Act defining public utilities, providing for the regulation thereof creating a public service commission, defining its duties and powers, and other matters relating thereto," approved March 28, 1919, and of all later enacted statutes of the State of Nevada amendatory thereof or supplemental thereto.

3.

That plaintiff has never at any time applied for or obtained the permission or consent of the public

service commission of the State of Nevada, or of the State of Nevada or any political subdivision thereof, or of the City of Reno, to install water meters, or the foundations thereof, for any purpose whatever in or upon the streets or alleys of the City of Reno.

4.

Wherefore defendants pray that they be hence dismissed with judgment and decree in their favor ror their costs of suit and for all other relief meet and proper in equity.

And now again come defendants by Le Roy F. Pike and [72] Sardis Summerfield as their attorney and solicitor and for a second counterclaim against plaintiff allege and show to the Court as follows, to wit:

A.

Admit the truth of the allegations contained in Paragraphs I and II of plaintiff's complaint.

B.

Allege that practically all of the streets and alleys in the City of Reno are and have been paved with thick macadam bases, heavy concrete overlying structure, and asphaltum or bithulitic street surface finish at a cost to the said city and of the real estate property owners therein of more than one and one-half million dollars. That the only unpaved portions of said streets are narrow strips between the concrete gutter curbs and the concrete sidewalk on said streets. That said narrow strips are the only practical and feasible portions of said

streets in or upon which water meters and the foundations thereof have been or may be installed and are the only places in which plaintiff intends to install water meters and their foundations and that such meters would if so installed by the escape and leakage therefrom and waters thereby collected undermine and unstabilize the concrete gutters in proximity thereto and progressively of the street pavement immediately adjacent to such meters and foundation. (That they would also operate as a catchment and retainer of stagnant water and that the effluvia arising therefrom would become a menace to the health of the people residing in their vicinity.) That they also would constitute obstacles and interferences with the re-establishment of any grade changes the City of Reno may desire to make in the future.

C.

Wherefore defendants pray that they be hence dismissed [73] with judgment and decree in their favor and against plaintiff for their costs of suit and for all proper equitable relief.

And now again come defendants by Le Roy F. Pike and Sardis Summerfield as their attorney and solicitor and for a third counterclaim against plaintiff allege and show to the Court as follows, to wit:

D.

Admit the truth of the allegations contained in Paragraphs I and II of plaintiff's complaint.

E.

Allege that all wastage of water within the cor-

porate limits of defendant, City of Reno, except negligible amounts thereof occurring at infrequent times and in isolated cases as the result of sporadic individual negligence or forgetfulness, from the time such water enters the pipes of plaintiff until its release therefrom at the place of use is, and heretofore has been, the result of the decrepit, weak, leaky, and imprefectly connected pipe-line system which now is and for several years last past has been used and operated by plaintiff in the City of Reno for the purpose of delivering water to said City of Reno and its inhabitants.

F.

WHEREFORE defendants pray that they be hence dismissed with judgment in their favor and against plaintiff for their costs of such and for all proper equitable relief.

LE ROY F. PIKE,
Attorney for Defendants.
SARDIS SUMMERFIELD,
Solicitor for Defendants. [74]

State of Nevada,
County of Washoe,—ss.

E. E. Roberts, being first duly sworn, deposes and says that he is the E. E. Roberts who is named as one of the defendants in the foregoing entitled action and that he verifies the foregoing answer for and on behalf of all of the defendants in said action.

That he has read the foregoing answer and counterclaims and knows the contents thereof and that the same is true of his own knowledge except

as to the matters therein stated upon information and belief and as to those matters he believes it to be true.

E. E. ROBERTS.

Subscribed and sworn to before me this 23d day of May, 1930.

JOHN S. BELFORD,
Notary Public.

Service by copy of foregoing answer as *of it* admitted this 23 day of May, 1930.

THATCHER & WOODBURN,
Attorneys for Plaintiff. [75]

Filed May 27th, 1930. E. O. Patterson, Clerk. By ————, Deputy.

[Title of Court and Cause.]

REPLY.

Comes now the plaintiff, and for reply to the first counterclaim of defendants, admits, denies and alleges as follows, to wit:

I.

Replying to Paragraph 2 of said first counterclaim, plaintiff admits that the defendant, City of Reno, is now, and for more than ten years last past has been, a city of more then ten thousand population. Plaintiff denies that it, or the City of Reno, or either of them, is, or ever has been, subject to

the provisions and requirements of the statute of the State of Nevada referred to in said paragraph, or to any other statutes of Nevada amendatory thereof or supplemental thereto. [76]

II.

Replying to Paragraph 3 of said first counterclaim of defendants, plaintiff admits that it has never applied for, or obtained, the permission or consent of the Public Service Commission of the State of Nevada, or the State of Nevada, or any of the political subdivisions thereof, or the City of Reno, to install water meters or foundations thereof, for any purpose whatsoever, in or upon the streets or alleys of the City of Reno.

III.

As a further defense to the matters and things set forth and alleged in said first counterclaim, the plaintiff herein alleges all of the matters and things set forth and contained in Paragraph III and IV of its complaint herein.

WHEREFORE, plaintiff prays that said first counterclaim be dismissed, and that it have judgment in its favor thereof.

For reply to the second counterclaim of defendants, plaintiff admits, denies and alleges as follows, to wit:

I.

Admits that the streets and alleys of the City of Reno, or a greater portion thereof, are paved, as alleged in Paragraph B thereof. Plaintiff denies that said narrow strips referred to therein are the

only practical and feasible portions of said streets in or upon which water-meters and foundations thereof have been or may be installed. Plaintiff denies that said places are the only places in which plaintiff intends to install water-meters and their [77] foundations, and in connection therewith, alleges that it is entirely possible and feasible to install water-meters and foundations inside of the curb line and on the property line of the various users and consumers. Plaintiff denies that such meters otherwise or at all installed, would or will, by escape and leakage therefrom, and/or cause of waters thereby collected, undermine and/or unstabilize the concrete gutters in proximity thereto and/or progressively of the street pavements adjacent to such meters or foundations. Plaintiff affirmatively alleges that no damage, undermining or unstabilizing of the pavements or concrete gutters, or either or any of them will be done, or in anywise affected by the installation and maintenance of its water-meters and foundations. Plaintiff denies that its said water-meters and foundations, or either or any of them, in anywise operate as a catchment and/or retainer of stagnant or other waters. Denies that any such waters be caught or retained by said water-meters and foundations, or either of them. Denies that any effluvia would arise therefrom, or be or constitute in anywise a menace to the health of people residing in their vicinity, or otherwise or at all. Plaintiff denies that said water-meters, and their foundations, or either of them, would or will in any way constitute any obstacle or inter-

ference with the re-establishment of any grade changes that the City of Reno may make, or desire to make, in the future.

II.

As a further defense to the matters and things set forth and alleged in said first counterclaim, the plaintiff herein alleges all of the matters and things set [78] forth and contained in Paragraphs III and IV of its complaint herein.

WHEREFORE, plaintiff prays that said second counterclaim be dismissed.

For reply to the third counterclaim alleged in the answer of defendants, the plaintiff admits, denies and alleges as follows, to wit:

I.

Replying to Paragraph E thereof, plaintiff denies that all wastage of water within the corporate limits of the City of Reno, except negligible amounts thereof, occurring at infrequent times and in isolated cases, is now, or heretofore has been, a result of decrepit and/or weak and/or leaky and imperfectly connected pipe-line system, operated by the plaintiff. Denies that the pipe-line system, or any part of the system of plaintiff, is now, or for several years last past has been, decrepit, weak, leaky and/or imperfectly connected.

WHEREFORE, plaintiff prays that said third counterclaim be dismissed:

THATCHER & WOODBURN,
GEO. B. THATCHER,
WM. WOODBURN,
Solicitors for Plaintiff. [79]

State of Nevada,
County of Washoe,—ss.

Geo. A. Campbell, being first duly sworn, deposes and says: That he is the president and manager of the plaintiff; that he has read the foregoing reply and knows the contents thereof, and the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to such matters he believes it to be true.

GEO. A. CAMPBELL.

Subscribed and sworn to before me this 26th day of May, 1930.

[Seal] JOHN DONOVAN,
Notary Public.

Service and receipt of the foregoing reply, and a copy thereof is admitted this 26th day of May, 1930.

LE ROY F. PIKE,
Attorney for Defendants. [80]

Filed May 31st, 1930. E. O. Patterson, Clerk.

[Title of Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL.

The above-named defendant, City of Reno, a municipal corporation, conceiving itself aggrieved by the decision made and orders entered on the 5th day of May, 1930, in the above-entitled cause and

having heretofore filed its notice of appeal from said decision and orders to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in its assignment of errors which has heretofore been filed herein, it prays that this appeal may be allowed and that a transcript of the record, proceedings, and papers upon which said decision and orders were made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

LE ROY F. PIKE,

City Attorney of the City of Reno for Defendant, City of Reno.

SARDIS SUMMERFIELD,

Solicitor for Defendant, City of Reno.

The foregoing claim of appeal is hereby allowed.

FRANK H. NORCROSS,

District Judge.

Dated: May 31st, 1930. [80¼]

[Title of Cause.]

MINUTES OF COURT—MAY 31, 1930—ORDER ALLOWING APPEAL AND FIXING BOND.

Le Roy F. Pike, Esq., of counsel for defendants herein, having presented notice of appeal and petition for allowance of appeal from an order made and entered May 5th, 1930, in the above-entitled cause, together with assignments of error, the following orders were made and entered, to wit: "Or-

der Allowing Appeal. (Order Allowing Appeal follows.)"

IT IS FURTHER ORDERED that bond, to act as a bond for costs on appeal, be and the same is hereby fixed in the sum of Three Hundred ($300.00) Dollars, and that citation on appeal issue herein. [80½]

Filed May 31, 1930. E. O. Patterson, Clerk. By O. E. Benham, Deputy.

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

A petition for allowance of an appeal from the decision and order of the Court entered on the 5th day of May, 1930, in the above-entitled cause having been filed in this court and good cause appearing therefor,—

NOW, THEREFORE, IT IS HEREBY ORDERED that said appeal be allowed, and that a transcript of the record, proceedings and papers upon which said decision and orders were made, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 31st day of May, A. D. 1930.

FRANK H. NORCROSS,
District Judge. [80¾]

Filed May 24, 1930. E. O. Patterson, Clerk. By O. E. Benham, Deputy.

[Title of Court and Cause.]

NOTICE OF APPEAL FROM DECISION AND ORDERS DENYING MOTIONS TO DISMISS COMPLAINT AND TO DISSOLVE RESTRAINING ORDER, AND FROM ORDER GRANTING INJUNCTION PENDENTE LITE.

To Plaintiff, Sierra Pacific Power Company, a Corporation, and to Thatcher and Woodburn as Its Attorneys of Record:

You and each of you are hereby notified that the above-named defendant, City of Reno, a municipal corporation, appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the decision and orders of the District Court of the United States in and for the District of Nevada made and filed in said District Court in the above-entitled action on May 5, 1930, denying the motions of said defendant, City of Reno, to dismiss plaintiff's complaint, and to dissolve the temporary restraining order theretofore issued without notice, and from the order of said District Court granting an injunction *pendente lite.* [81]

LE ROY F. PIKE,
Attorney of Defendant, City of Reno.
SARDIS SUMMERFIELD,
Solicitor for Defendant, City of Reno.

Served by copy of the foregoing notice of appeal is hereby admitted as of after filing this 23d day of May, 1930.

THATCHER & WOODBURN,
Attorneys for Plaintiff. [82]

Filed May 24th, 1930. E. O. Patterson, Clerk. By O. E. Benham, Deputy.

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the above-named defendant, City of Reno, a municipal corporation, and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above-entitled cause from the decision and orders made by this Honorable Court on the 5th day of May, 1930.

I.

That the United States District Court for the District of Nevada erred in denying the motion interposed by said defendant, City of Reno, to dismiss plaintiff's complaint, for the following reasons, to wit: [83]

1. That it affirmatively appears from the face of said bill of complaint that plaintiff as a public utility corporation is engaged in the business of serving and distributing water to defendant, City of Reno, a city of more than ten thousand popu-

lation, and to the inhabitants thereof, for domestic and other beneficial purposes and that the relief sought by plaintiff in this action is an injunction prohibiting and preventing defendants from obstructing plaintiff from installing or maintaining water-meters upon or in the streets and alleys of defendant, City of Reno, with which to measure the quantity of water served or delivered to said defendant, City of Reno and to the inhabitants thereof as water users and that said alleged relief if permitted would be in violation of the direct terms of that certain statute of the State of Nevada entitled "An Act defining public utilities, providing for the regulation thereof, creating a public service commission, defining its duties and powers, and other matters relating thereto," approved March 28, 1919, and particularly of the terms of the proviso contained in section 13 of said statute.

2. That said bill of complaint fails to state any facts entitling it to install or to maintain water-meters upon or in the streets and alleys of defendant, City of Reno, with which to measure the quantity of water served or delivered to said City, or to the inhabitants thereof, in that it is not alleged or stated therein that plaintiff has the permission or consent of defendant, City of Reno, or of the State of Nevada, or of the Public Service Commission of the State of Nevada, or of any other authority whatever, to so install or maintain such water-meters in or upon said places. [84]

3. That said bill of complaint fails to allege or state any grant, provision, or term, contained in

any franchise or franchises under which it has been acting in serving and distributing water to defendant, City of Reno, and to the inhabitants thereof, authorizing it to install or to maintain water-meters upon or in the streets or alleys of said defendant for the purpose of measuring the quantity of water served or delivered to said City or to its inhabitants, or for any other purpose whatever, or at all.

4. That it does not appear from plaintiff's bill of complaint that plaintiff's occupancy and use in the past of the streets and alleys of defendant, City of Reno, for the installation and maintenance of its instrumentalities for serving and distributing water was by virtue of any grant, franchise, or authority so to do or was exercised by plaintiff in any other way, or manner than that of a seizor and trespasser.

5. That it does not appear from the facts alleged in plaintiff's bill of complaint that plaintiff now is, or ever has been engaged in the business of selling or furnishing water to defendant, City of Reno, or to the inhabitants thereof, but that upon the contrary it affirmatively appears therefrom that it now is, and at all times mentioned in its bill of complaint has been, no more than the agent of said defendant and its inhabitants for the diversion, transportation, distribution and delivery of such water.

6. That said bill of complaint fails to state facts sufficient to show any necessity whatever for the installation or maintenance of any water-meters

in or upon the streets or alleys of the defendant, City of Reno. [85]

7. That said bill of complaint does not state facts sufficient to show that the installation and maintenance of water-meters upon or in the streets and alleys of defendant, City of Reno, will not constitute an obstruction to the proper and reasonable use thereof by the said defendant and by the general public.

II.

That the United States District Court for the District of Nevada erred in issuing its temporary restraining order without notice to the defendant, City of Reno, for the reason that specific facts clearly showing plaintiff's danger of suffering immediate and irreparable injury, loss, or damage unless said defendant was enjoined without notice, was not shown to the Court by plaintiff's verified complaint or otherwise.

III.

That the United States District Court for the District of Nevada erred in issuing its temporary restraining order without notice to defendant, City of Reno, without therein specifically defining the injury and stating why it is irreparable and why the order was granted without notice.

IV.

The United States District Court for the District of Nevada erred in denying the motion of defendant, City of Reno, to dissolve the temporary restraining order issued without notice for the reason

the same was voidable and ineffectual because of the failure to specifically include therein a definition of the injury and a statement of why it is irreparable and why it was granted without notice. [86]

V.

The United States District Court for the District of Nevada erred in continuing in a modified form as an injunction *pendente lite* the temporary restraining order issued without notice for the reason that the same was voidable and ineffectual for any purpose and should have been dissolved upon the motion of defendant, City of Reno.

LE ROY F. PIKE,
Attorney for Defendant, City of Reno.
SARDIS SUMMERFIELD,
Solicitor for Defendant, City of Reno.

Service by copy of the foregoing assignment of errors as of after filing is admitted this 23d day of May, 1930.

THATCHER & WOODBURN,
Attorneys for Plaintiff. [87]

Filed June 9, 1930. E. O. Patterson, Clerk. By O. E. Benham, Deputy.

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, the City of Reno, a municipal corporation,

as principal, and National Surety Company, a corporation, as surety, are held and firmly bound unto plaintiff, Sierra Pacific Power Company, a corporation, the above-named plaintiff, in the full and just sum of Three Hundred and No/100 ($300.00) Dollars to be paid to the said plaintiff, its attorneys, assigns, receivers, or successors in interest, to which payment, well and truly to be made, we bind ourselves and our successors in interest jointly and severally by these presents.

Signed and dated this 4th day of June, 1930.

WHEREAS, at a session of the above-entitled court in a session held on the 5th day of May, 1930, in a suit pending in said court between Sierra Pacific Power Company, a corporation, as plaintiff and the City of Reno, a municipal corporation et als., as defendants, an order of said court was entered against the said defendants refusing to dismiss plaintiff's complaint and refusing to dissolve the temporary restraining order issued without notice in said action and continuing in a modified form said temporary restraining order as an injunction *pendente lite,* and whereas defendant, City of Reno, a municipal corporation, has appealed from the said order of the said District Court to the United States Circuit Court of Appeals for the Ninth Circuit.

NOW THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that if the said City of Reno, a municipal corporation, shall prosecute said [88] appeal to effect and answer all damages and costs if it fails to make its said plea good, then the

above obligation to be void, otherwise to remain in full force and virtue.

CITY OF RENO, a Municipal Corporation.

[Seal] By E. E. ROBERTS,
Mayor.

And by J. B. REESE,
Clerk.

NATIONAL SURETY COMPANY.

[Seal] By R. W. STEWART,
Attorney-in-fact. (R. W. STEWART.)

The foregoing bond on appeal is hereby approved this 9th day of June, 1930.

FRANK H. NORCROSS,
District Judge.

[Endorsed]: In the District Court of the United States, in and for the District of Nevada. Sierra Pacific Power Company, a Corporation, Plaintiff, v. City of Reno, a Municipal Corporation, E. E. Roberts, Mayor of the City of Reno, James Glynn, City Engineer of the City of Reno, Le Roy F. Pike, City Attorney of the City of Reno, Defendants. Appeal Bond. [89]

Filed May 31, 1930. E. O. Patterson, Clerk.

[Title of Court and Cause.]

PRAECIPE FOR CERTIFICATION OF RECORD ON APPEAL.

To E. O. Patterson as Clerk of the Above-entitled Court:

Please certify and make return on appeal to the United States Circuit Court of Appeals for the Ninth Circuit the record on appeal in the above-entitled action as defined by rule 14 of said Circuit Court of Appeals and to which said rule you are hereby referred for your guidance.

Very respectfully,
LE ROY F. PIKE,
City Attorney and Attorney for Defendant, City of Reno.
SARDIS SUMMERFIELD,
Solicitor for Defendant, City of Reno. [90]

Filed June 16, 1930. E. O. Patterson, Clerk. By O. E. Benham, Deputy.

[Title of Court and Cause.]

PRAECIPE FOR CERTIFICATION OF RECORD ON APPEAL.

To E. O. Patterson as Clerk of the Above-entitled Court:

Please certify and make return on appeal to the

United States Circuit Court of Appeals for the Ninth Circuit the record on appeal in the above-entitled action as defined by rule 14 of said Circuit Court of Appeals and to which said rule you are hereby referred for your guidance.

Very respectfully,

LE ROY F. PIKE.

(Signed) LE ROY F. PIKE,

City Attorney and Attorney for Defendant, City of Reno.

SARDIS SUMMERFIELD.

SARDIS SUMMERFIELD,

Solicitor for Defendant, City of Reno.

Service of the foregoing is hereby acknowledged this 14th day of June, A. D. 1930.

THATCHER & WOODBURN,

Solicitors for Plaintiff. [90½]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Nevada,—ss.

I, E. O. Patterson, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of Sierra Pa-

cific Power Company, a Corporation, Plaintiff, vs. City of Reno, a Municipal Corporation et als., Defendants, said case being No. G.–29 on the docket of said court.

I further certify that the attached transcript, consisting of 93 typewritten pages numbered from 1 to 93, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as [91] the same appears from the originals of record and on file in my office as such Clerk in the City of Carson City, state and district aforesaid.

I further certify that the cost for preparing and certifying to said record, amounting to $37.25, has been paid to me by LeRoy F. Pike, Esq., one of the attorneys for the defendants in the above-entitled cause.

And I further certify that the original citation, issued in this cause, is hereto attached.

WITNESS my hand and the seal of said United States District Court this 28th day of June, A. D. 1930.

[Seal] E. O. PATTERSON,
Clerk, U. S. District Court, District of Nevada.
[92]

Filed June 9, 1930. E. O. Patterson, Clerk. By O. E. Benham, Deputy.

[Title of Court and Cause.]

CITATION ON APPEAL.

To Sierra Pacific Power Company, a Corporation, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, California, on the 1st day of July, 1930, pursuant to a notice of appeal filed in the Clerk's office of the District Court of the United States in and for the District of Nevada, wherein the City of Reno, a municipal corporation, is appellant and you are appellee, to show cause, if any there be, why the decision and orders rendered against appellant as in said notice of appeal mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

WITNESS the Honorable FRANK H. NORCROSS, as Judge of the District Court of Nevada, this 31st day of May, 1930.

FRANK H. NORCROSS,
U. S. District Judge.

[Seal] Attest: E. O. PATTERSON,
Clerk.

June ——, 1930.

Service by copy of the foregoing citation on appeal is admitted this 7th day of June, 1930.

THATCHER & WOODBURN,
Solicitors for Appellee. [93]

[Endorsed]: No. 6178. United States Circuit Court of Appeals for the Ninth Circuit. City of Reno, a Municipal Corporation, Appellant, vs. Sierra Pacific Power Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Nevada.

Filed July 1, 1930.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6178

United States
Circuit Court of Appeals
For the Ninth Circuit

CITY OF RENO, a Municipal Corporation,
Appellant,

vs.

SIERRA PACIFIC POWER COMPANY, a Corporation,
Appellee.

Appellant's Brief

Upon Appeal from the United States District Court for the District of Nevada.

No. 6178

United States
Circuit Court of Appeals
For the Ninth Circuit

CITY OF RENO, a Municipal Corporation,
Appellant,

vs.

SIERRA PACIFIC POWER COMPANY, a Corporation,
Appellee.

Appellant's Brief

Upon Appeal from the United States District Court for the District of Nevada.

INDEX OF SUBJECT MATTER

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

SIERRA PACIFIC POWER COMPANY, a Corporation, Plaintiff and Appellee, vs. CITY OF RENO, a Municipal Corporation, E. E. ROBERTS, Mayor of the City of Reno, JAMES GLYNN, City Engineer of the City of Reno, LeROY F. PIKE, City Attorney of the City of Reno, Defendant, City of Reno, Appellant.	IN EQUITY No. G-29 APPELLANT'S INITIAL BRIEF

STATEMENT OF CASE

Appellee is a corporation of the State of Maine and appellant, City of Reno, is a municipal corporation of the State of Nevada and now contains and for more than ten years last past has contained a population of more than ten thousand inhabitants.

Appellee and its predecessors in interest have for many years last past been and now are engaged in the business of serving and distributing water to appellant and its inhabitants and using under claim of franchise rights so to do the streets and alleys of appellant for the purpose of effecting such service and distribution.

Neither appellant nor any of its predecessors in

interest have as yet installed any mechanical devices or water meters in the City of Reno for measuring the quantity of water distributed to said city, or to its inhabitants, save a few the installation of which precipitated the above entitled pending suit.

At sometime shortly prior to March 27, 1930, appellee without the consent or permission of the Public Service Commission of the State of Nevada commenced the installation, upon the streets of the City of Reno, of water quantity measuring meters and upon discovery of the fact the said City acting by its mayor and city attorney demanded the removal of the installed meters immediately and threatened to have the city engineer remove them if appellant did not do so.

Upon the succeeding day, March 28, 1930, appellant renewed its demand for the removal of the meters within ten days and again notified appellee that if it did not remove the meters within the ten days the city engineering department would do so.

On April 3, 1930, appellee filed its complaint against the City of Reno and its mayor, city engineer and city attorney, praying for a temporary restraining order without notice and upon hearing its continuance as an injunction **pendente lite** until final determination of the cause restraining the City and its officers from removing or destroying the installed meters and from preventing appellee from continuing to install meters.

Upon the next day, April 4, 1930, the lower court upon the verified complaint and the motion of ap-

pellee's solicitors, and without notice to defendants or either thereof, issued its temporary restraining order in accordance with the prayer of appellee's complaint.

Thereafter on hearing day appellant moved for a dismissal of the complaint on various grounds and also moved for a dissolution of the temporary restraining order issued without notice upon the specific ground that the order was voidable and ineffectual for the reason that it did not in itself define the injury and did not state why it is irreparable, and did not state why it was issued without notice.

The court after argument on the motions took them under advisement and on May 5, 1930, rendered and filed its memorandum decision and orders denying appellant's motions to dismiss the complaint and to dissolve the temporary restraining order and further ordered the latter order continued as an injunction **pendente lite** modified however to a maintenance of the status quo of the subject matter of controversy.

Thereupon the appellant, City of Reno, appealed to this court.

Since the initiation of the appeal the defendants answered upon the merits of the action and appellee thereupon filed its reply to the answer.

SPECIFICATION OF ERRORS RELIED UPON

1. The court erred in denying appellant's motion to dismiss the complaint because it appeared to the court therefrom that appellant, City of Reno, is a city of more than ten thousand inhabitants and that the installation of water quantity measuring meters therein was and would be in violation of a statute

of the State of Nevada approved March 28, 1919.

2. The court erred in denying the motion to dismiss the complaint because it failed to allege the permission or consent of the Public Service Commission of the State of Nevada to install within the City of Reno water quantity measuring meters.

3. The court erred in denying the motion to dismiss the complaint because it failed to plead the authority granting, the duration, or the terms and conditions of any franchise under which it claims the right to install water quantity measuring meters in the City of Reno.

4. The court erred in denying the motion to dismiss the complaint because it appears therefrom that appellee was not and is not the owner of the water served and distributed to appellant, City of Reno, and to its inhabitants, but that the latter are the owners thereof and that appellee is the mere agent of the latter in serving and distributing such water.

5. The court erred in denying the motion to dismiss the complaint because it fails to plead any facts showing an actual necessity requiring the installation of water quantity measuring meters in the City of Reno.

6. The court erred in denying the motion to dismiss the complaint because it failed to plead any fact showing that the installation and maintenance of water quantity measuring meters would not constitute an obstruction to the proper and reasonable use of the streets and alleys of Reno by the general public.

7. The court erred in issuing its temporary restraining order without notice because the verified

complaint upon which alone the order was issued failed to **clearly** show appellee's danger of suffering immediate and irreparable injury, loss, or damage, unless appellant was enjoined without notice.

8. The court erred in issuing its temporary restraining order without notice and failing therein to specifically define the injury and to state why it is irreparable and why it was granted without notice.

9. The court erred in denying appellant's motion to dissolve the temporary restraining order because the same failed therein to define the injury and to state why it is irreparable and why it was granted without notice.

10. The court erred in continuing in a modified form as an injunction **pendente lite** the temporary restraining order because the same was voidable and ineffectual and should have been dissolved upon appellant's motion.

BRIEF OF ARGUMENT

I.

In support of its Specifications of Errors Relied Upon, 1, appellant cites the following provisions of a general Statute of the State of Nevada entitled, "An Act defining public utilities, providing for the regulation thereof, creating a public service commission, defining its duties and powers, and other matters relating thereto," approved March 28, 1919, and found in the Statutes of Nevada for the year 1919, commencing therein at page 198:—

"Section 1. The public service commission is hereby

created whose duty it shall be to supervise and regulate the operation and maintenance of public utilities, as hereinafter named and defined, in conformity with the provision of this act."

"Sec. 7. . . . 'Public Utility' shall also embrace every corporation, company, individual, association of individuals, their lessees, trustees or receivers appointed by any court whatsoever, that now or hereafter may own, operate or control any plant or equipment, or any part of a plant or equipment within the state for the production, delivery or furnishing for or to other persons, firms, associations or corporations, private or municipal, heat, light, power in any form or by any agency, water for business, manufacturing, agricultural or household use, or sewerage service whether within the limits of municipalities, towns or villages or elsewhere; and the public service commission is hereby invested with full power of supervision, regulation and control of all such utilities, subject to the provisions of this act and to the exclusion of the jurisdiction, regulation and control of such utilities by any municipality, town or village, unless otherwise provided by law." . . .

"Sec. 13. The commission may, when necessary, ascertain and prescribe for each kind of public utility adequate, convenient and serviceable standards for the measurement of quality, pressure, voltage or other conditions pertaining to supply of the product or service rendered by any public utility,and prescribe reasonable regulations for the examining and testing of such products or service and for the measurement

thereof. Any consumer, user or party served may have the quality or quantity of the product or the character of any service rendered by any public utility tested upon the payment of fees fixed by the commission, which fees, however, shall be paid by the public utility and repaid to the complaining party if the quality or quantity of the product or the character of the service be found by the commission defective or insufficient in a degree to justify the demand for testing; or the commission may apportion the fees between the parties as justic may require; provided, that in cities of more than ten thousand population nothing contained in this act shall direct or permit the installation or the use of mechanical water meters or similar mechanical devices to measure the quantity of water served or delivered to water users.

"The commission may, in its discretion, purchase such materials, apparatus, and standard measuring instruments for such examination and tests as it may deem necessary. The commission shall have the right and power to enter upon any premises occupied by any public utility for the purpose of making the examination and tests provided for in this act and set up and use on such premises any necessary apparatus and appliances and occupy reasonable space therefor. Any public utility refusing to allow such examination to be made as herein provided shall be subject to the penalties prescribed in section 11 of this act." . . .

It at all times has been admitted by the appellee and was by it specifically admitted at the hearing in the district court, that appellant, City of Reno, is and

for more than ten years last past has been a city of more than ten thousand population. Even had such admission never been made such fact sufficiently appears by applying the principles of mean averages to the allegations of maximum and minimum water consumption found in paragraph IV of appellee's complaint.

Transcript of Record, p. 5.

While specific reference to the Nevada public statute cited above appears in paragraph V of appellee's complaint, Transcript of Record, p. 8, yet it is not essential that in either the district court or in this court the statute must be pleaded to entitle it to consideration.

In federal practice all courts take judicial notice, without pleading, of the public statutes of the State where they are exercising their functions.

Furman vs. Nicholls, 8 Wall, 44.

Schevenell vs. Blackwood, 35 Fed. (2d) 423.

It will readily be observed from the aforesaid provisions of statute that the supervision and regulation of the operation and maintenance of public utilities in Nevada is delegated exclusively to the public service commission of the State.

It also plainly appears therefrom that the commission itself can lawfully act only in conformity with the provisions of the act creating it.

It would seem to necessarily follow that the public service commission could not in conformity with the terms of the proviso in the statute cited permit the installation of water quantity measuring meters in

Reno and certainly, no other power could do so because of the commission's exclusive power of supervision and regulation.

It is appellant's view that the district court erred in adopting appellee's contention that because it intended to use the meters for other purposes than to obtain a base for rate charges against water users the statutory inhibition does not apply. The statute does not contemplate possible intended objectives other than an ultimate one of fixing unit rate charges based upon the amount of water delivered. The meters sought to be installed admittedly are water **quantity** measuring devices and not ones for ascertaining the quality, pressure, or other elements incident to the use of water.

Again it specifically appears from the allegations of appellee's complaint

"That the installation of said meters is necessary in order that plaintiff may determine and ascertain from time to time the amount of water used by various of its consumers so that the company may from time to time classify its said consumers for the purpose of fixing and determining the rate classification to be charged for the service and to the classes of consumers using the same."

Transcript of Record, p. 6.

It is fundamental in our jurisprudence that equity follows the law or is as stated by Broome as a maxim:

"Equity is the handmaiden of the law, not its mistress."

It is earnestly submitted that whether or not the

motion to dismiss should have been sustained it is clear the motion to dissolve the restraining order should have been granted because of the effect of the statute cited.

II.

Relative to assigned error 2 to the effect that the district court erred in refusing to dismiss the complaint because it failed to allege permission of the public service commission to install water quantity measuring meters in Reno appellant urges that even though the installation of water quantity measuring meters were intended to be used only as mere check meters yet they clearly fall within the inhibition of the statute.

If this conclusion must follow the issueable situation disclosed by the pleadings it must be apparent that not only the district court erred in refusing to dismiss the complaint but also erred in granting a temporary restraining order and in continuing it as an injunction **pendente lite.**

III.

Now referring to assigned error relied upon by appellant based upon its claim that appellee's complaint fails to properly plead any franchise right of appellee entitling it to install water quantity measuring meters in Reno appellant contends the record on appeal is quite clear in support of the contention.

The only allegation in the complaint upon the subject of franchise reads as follows:

"That plaintiff and its predecessors in interest, acting as aforesaid, have been acting under and by virtue

of franchise and the right to furnish, serve, distribute and sell water to the inhabitants of the Cities of Reno and Sparks and to said Cities of Reno and Sparks, for domestic use, commercial purposes, fire and other sundry purposes and uses."

Transcript of Record, p. 4.

Whether appelle by this allegation means that its alleged **right** is derivative from **franchises** or is one independent of franchises is a baffling puzzle unless we apply the rule of grammatical construction that the coordinate conjunction **and** ordinarily conjoins independent elements and therefore appellee has intended to plead not only a franchise right but also a right independent of franchise to install its water quantity measuring meters in Reno.

It is too plain to require argument that the complaint does not plead sufficient, or any, facts entitling it to install the meters independent of franchise right.

We think it almost equally plain that appellant has signally failed in both its complaint and in its proof at the hearing to connect with any franchise right or rights whatever entitling it to install the meters.

A bare allegation that in its water service operation appellee has been acting under and by virtue of franchises can not in conformity with any established rule of fact pleading be held equivalent to or as being an ownership allegation of franchise rights.

"Franchises are special privileges conferred by government upon individuals, and do not belong to citizens of the country generally, of common right. It is essential to the character of a franchise that it should

be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from the law of the state."

Bank vs. Earl, 13 Pet., 595.

People's Co. vs. Memphis Co., 10 Wall, 38.

Western Union Co. vs. Norman, 77 Fed., 13.

Those pleading alleged franchise rights must plead their derivation, scope, and tenure because their operative effect is a matter of law for the court to decide upon alleged and proven facts and because they are strictly construed against the grantee and in favor of the public and nothing will pass thereunder unless it is granted in clear and explicit terms.

Covington Co., vs. Sanford, 164 U. S. 578.

Oregon Co. vs. Oregonian Co., 130 U. S. 1.

State vs. Dayton Co., 10 Nev., 155.

Lake vs. V. & T. Co., 7 Nev., 294.

The evidence introduced by appellee at the hearing in the district court utterly failed to connect appellee with any franchise right whatever.

The evidence adduced in addition to the complaint consisted of six documents only and file marked exhibits "B.," "C.," "D.," "E.," "F.," and "G."

Transcript of Record, pp. 31-76.

The nature of the contents of these exhibits are as follows:

B. Commissioner's grant to Reno Water Co.

C. Commissioner's grant to Reno Water Co.

D. Deed, Reno Water Co. to Reno Water, Land & Light Co.

E. Deed, Reno Water, Land & Light Co. to Nevada Power, Light and Water Co.

F. Deed, Nevada Power, Light and Water Co., to Reno Power, Light and Water Co.

G. Deed, Reno Power, Light and Water Co. to Truckee River General Electric Co.

It will thus be seen that these exhibits do not even mention appellee, Sierra Pacific Power Company.

No franchise right or rights of appellee of any kind having been either pleaded or proved it would seem to be an irresistible conclusion of law that appellee is precluded from claiming any franchise right to install quantity measuring meters in Reno.

IV.

Now alluding to assigned error 4 relied upon by appellant upon the theory that the several allegations in appellee's complaint to the effect that appellee now is and has been engaged in the business of "selling water" to the cities of Reno and Sparks and to their inhabitants are contrary to the established law of the State of Nevada as adjudged by its Supreme Court we view this phase as follows:

That appellee under the laws of the State of Nevada is not and never has been the owner of the water it diverts, transports, and distributes or had title thereto and in such diversion, transporation, and distribution is and at all times has been the agent of the water users is **stare decicisis** in Nevada.

Prosole vs. Steamboat Canal Co., 37 Nev. 154.

The decision of the Nevada Supreme Court in the last cited case establishes a rule of law definition of

property rights on a local question not affected by general federal law and in such case the federal court will follow the decision of the highest State Court.

Olcott vs. Bynum, 17 Wall, 44.

Concord vs. Bank, 92 U. S. 628.

Clark vs. Clark, 178, U. S. 186.

V.

Requesting the attention of this court to assigned error 5 in which appellant insists that the complaint fails to plead any facts tending to show an actual necessity for installing the water quantity measuring meters in Reno we urge that a scrutiny of the alleged necessity facts discloses that they are mere conclusions of the appellee.

Transcript of Record, p. 6.

In each and every of these necessity allegations there is no assertion, or intimation even, that the objective ascertainment sought cannot readily be obtained otherwise than by the installation of meters.

It is a well settled rule of law in both the federal and state courts in equity actions as well as in those at law that immaterial matters, conclusions of law, and conjectural averments in a pleading may be disregarded and are not admitted even by a failure to deny them.

Central Bank vs. Conn. Ins. Co., 104 U. S. 54.

Hooper vs. Meyer, 1 Nev. 433.

Kidwell vs. Ketler, 146 Cal. 17.

Chicot Co. vs. Sherwood, 148 U. S. 529.

Equitable Soc. vs. Brown, 213 U. S. 25.

Interstate Co. vs. Maxwell Co., 139 U. S. 569.

VI.

Adverting to assigned error 6 relative to appellant's claim that the complaint fails to plead any fact showing that the meters will not constitute obstruction in the streets we cite the only allegation in that respect:

> "That the meters which have been installed by plaintiff, as well as the meters which the company proposes to install, together with the foundations therefor, do not and will not constitute obstructions in any of the streets and alleys of the City of Reno."
>
> Transcript of Record, p. 7.

If this allegation is anything more than the bold conclusion of the pleader we fail to understand plain English language.

Neither courts nor individuals can be expected to be mind readers and know whether the meters proposed to be installed will be street obstructions in the absence of any allegation whatever respecting their character and manner of installation.

VII.

Respecting assigned error 7 in which appellant claims that the complaint fails to clearly show appellee's danger of suffering immediate and irreparable damage unless appellant was enjoined without notice we submit that this error is apparent.

The meters sought to be installed and their foundations are mere merchandise commodities and if removed or even destroyed the resulting damage is one

easily ascertainable as a matter of fact. It is almost inconceivable that such damage would be remediless.

A mere allegation that threatened injury or damage is irreparable is insufficient to **clearly** show the element of irreparability. Such showing must be made to appear by verified statements of specific facts.

The amended federal judicial code contains the following mandatory provision:

> "No temporary restraining order shall be granted without notice to the oposite party unless it shall clearly appear from specific facts shown by affidavit or the verified bill that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon."
>
> 38 Stat. 737, approved, Oct. 15, 1914.

VIII.

Appellant's assigned error 8 resting upon the fact that the district court granted the temporary restraining order without notice and failed therein to specifically define the injury and why it is irreparable and why it was granted without notice is indisputable if the amended federal judicial code upon this subject is effectively controlling and which reads as follows:

> "Every such temporary restraining order shall be endorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and

state why it is irreparable and why it was granted without notice."

Par. 17, 38 Stat. 737, approved, Oct. 15, 1914.

The restraining order is fatally defective in this matter of contents.

Transcript of Record, pp. 17-18.

If it be contented or suggested by appellee that the restraining order complies with the requirements of Equity Rule 73 as adopted by the Supreme Court of the United States we answer that these Equity Rules were adopted by the Supreme Court and became effective on February 1, 1913, and at the time of their adoption conformed with the requirements of the federal law as it existed at that time. As heretofore cited however on October 15, 1914, the federal judicial code was amended by adding, **ex industria,** the requirements that temporary restraining orders granted without notice to the opposite party must in themselves specifically define the injury and state why it is irreparable and why it was granted without notice.

It is not believed that appellee will for a moment contend that rules of court are not superseded by later statutes regulating the particular subject matter embraced by both.

If such contention is advanced by appellee we cite to the contrary:

Gaines vs. Relf, (U.S.) 10 L. Ed. 642.

Storey vs. Livingston, (U.S.) 10 L. Ed. 200.

Ames vs. Smith, (U.S.) 10 L. Ed. 947.

IX.

In support of assigned error 9 in which appellant asserts that the district court erred in denying its motion to dissolve the temporary restraining order because it failed to define the injury and to state why it is irreparable and why it was issued without notice we renew our views as expressed in the last foregoing paragraph of this brief.

While the mandatory requirements of the federal law of October 15, 1914, may have been overlooked by appellee's solicitors and the district court at the time of the granting of the temporary restraining order they could not have escaped notice and scrutiny when the motion to dissolve was made in reliance upon these particular requirements.

X.

We insist that assigned error 10 attacking the continuation of the temporary restraining order as an injunction **pendente lite** notwithstanding the motion to dissolve it is fundamentally sound.

If our insistence that the temporary restraining order is inherently fatally defective it is palpably frivolous to contend that an order continuing it as an injunction **pendente lite** cures its fatal defects.

XI.

In conclusion we submit that if the laws of the State of Nevada and of the United States hereinbefore cited are applicable to the situation under consideration and that their express terms have been disregarded as though they were merely directory formula this court should reverse the district court

and direct it to dissolve the temporary restraining order both as an initial writ and as an injunction **pendente lite.**

Respectfully submitted,

LeROY F. PIKE,

Attorney for Appellant.

SARDIS SUMMERFIELD,

Solicitor for Appellant.

Service of the foregoing brief by copies delivered to us is hereby admitted this.....day of August, 1930.

.....

Solicitors for Appellee.

No. 6178

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SIERRA PACIFIC POWER COMPANY, a corporation, *Plaintiff and Appellee,* vs. CITY OF RENO, a Municipal Corporation, E. E. ROBERTS, Mayor of the City of Reno, JAMES GLYNN, City Engineer of the City of Reno, LEROY F. PIKE, City Attorney of the City of Reno, *Defendants,* CITY OF RENO, *Appellant.*	In Equity No. G—29

APPELLEE'S REPLY BRIEF.

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APPELLEE'S REPLY BRIEF.

STATEMENT OF CASE.

The appellee and its predecessors in interest have for many years been, and now are, engaged in the business of selling and distributing water, and serving the inhabitants of the City of Reno with water for domestic and other purposes, and have used, and are using, the streets and alleys of the City of Reno, under claim of franchise, and acquiescence by the city for many years, for the purpose of effecting such service.

Some months prior to March 27, 1930, the company commenced the installation of water meters on its mains and services on the streets and adjacent to the streets of the City of Reno. These meters were installed for the purposes which are set forth in the complaint and which may be generally stated as being for checking and statistical purposes. The company desiring, and finding it necessary to obtain, the following information and statistical data:

(a) The amount of water necessary to be furnished to its customers;

(b) The waste by customers, if any, and the classification of such waste between customers;

(c) Whether there are leakages in the mains or services, and if the same are due to defects in its mains, etc.;

(d) The reasonable and normal use of various classes;

(e) To determine and ascertain the use by its various consumers so that it could obtain information for the purpose of rate classification; and

(f) The amount of water necessary to be furnished to the inhabitants of the Cities of Reno and Sparks so that the company could provide for such additional water as may be necessary for the conduct of its business, and to supply its customers and provide service for the continued increase in population of the said cities (Trans. pp. 4 to 7, inc.).

On March 27, 1930, the City Attorney of Reno, acting under instructions from the Mayor, demanded that the

meters and foundations be immediately removed and that the company cease installing meters in the streets and alleys (Trans. p. 8). The next day the City Attorney addressed a further communication to the company demanding that the meters so installed be removed within ten days, and if not removed within ten days that the City Engineering Department would remove the same (Trans. p. 9).

In this situation the appellee filed its bill of complaint for injunction in the United States District Court for the District of Nevada. A temporary restraining order was issued, restraining the defendants from their threatened action until hearing of the application for injunction. The application for injunction was set for hearing by order of the court for the twelfth day of April, 1930. *On the eighth day of April, 1930, the attorneys for the respective parties stipulated that the hearing of the application for injunction be continued until the twenty-fourth day of April, 1930, and further stipulated that the restraining order be continued in full force and effect until said date and until the hearing of the application for injunction* (Trans. p. 22). An appropriate order was thereupon made by the District Judge (Trans. p. 23).

On April 24, 1930, the application for injunction came on for hearing and was heard by the court. The injunction was granted, the court ordering that the restraining order be continued as an injunction *pendente lite*. The pleadings before the court at the time of the hearing were the verified complaint of the plaintiff and motion to dismiss the complaint and dissolve temporary restraining

order of the defendants. At the time of the hearing of the application for injunction and the granting thereof the answer of the defendant and the reply of the plaintiff had not been filed.

BRIEF OF ARGUMENT.

I.

It is first urged on behalf of the appellant that the appellee had and has no right to install water meters or similar mechanical devices at any place within the limits of the City of Reno because of certain provisions of "An Act defining public utilities, etc." The appellant relied upon Section 13 of the Act, which is set forth in full in its brief. This section confers upon the Commission the power to ascertain and prescribe adequate, convenient and serviceable standards for the measurement of service and of the product sold or delivered; and to prescribe rules and regulations for the purpose of testing the product and for the measurement thereof. In general, it is similar to the statutes which can be found in the public utility acts of the various states. Section 13, however, contains the following proviso:

> "Provided, that in cities of more than ten thousand population nothing in this act shall direct or permit the installation or use of mechanical water meters or similar mechanical devices to measure the quantity of water served or delivered to water users."

It is not disputed that the City of Reno has a population of more than ten thousand, but we do urge that

this proviso has no application to the situation presented by the bill of complaint. The appellee in its complaint sets forth the purpose and necessity for the installation of the meters (Trans. pp. 4 to 7, inc.) and specifically states (Trans. p. 7) as follows:

> "That the meters so installed by the plaintiff and other meters which the plaintiff intends to install, operate and maintain, are, and will be, installed for the purposes hereinbefore set forth, and are and will be check meters for the purpose of giving to the company information and data necessary and desirable in the operation of its business. That said meters have not been installed, nor will the meters which the company proposes to install be installed, for the purpose of fixing charges against the users and consumers of plaintiff in the City of Reno."

Under a construction most favorable to appellant, the most that can be said of the proviso in Section 13, is that it was intended to prevent the installation of meters or similar mechanical devices when the same were to be used to measure the quantity of water served or delivered to the individual consumer. The District Court also took this view as will be seen by its memoranda opinion (Trans. p. 75).

We urge that the act certainly was never intended and that it does not prohibit the utility furnishing water to the cities, and the inhabitants thereof, of more than ten thousand population, from installing upon their mains, lines and services within the city check meters or other apparatus used solely for statistical information to the utility.

II.

It is urged in support of "Assigned Error 2" that the District Court erred in failing to dismiss the complaint because it failed to allege permission of the Public Service Commission to install water meters, even though the meters were to be but check meters.

This is indeed an anomalous objection. The city urges, first, that no meters were permitted even with the consent of the Commission, and then claims error because the complaint did not allege a permission from the Public Service Commission to install the meters.

We submit that there is nothing in either Section 13, or in any other provision of the public utility act, which prevents or restricts a public utility from installing check meters, and there is no provision of the act or any of the sections referred to which requires a public utility to first obtain permission of the Public Service Commission before it installs devices for the measurement of its product. The public utility act was not intended to make the Public Service Commission either the owner, general manager, or operator of public utilities. The utility has the right to manage and operate its property, subject only to reasonable regulation by the Commission as to rates and service.

State Public Utilities Commission v. Springfield G. & E. Co., 125 N. E. 891;

Missouri ex rel. S. W. Bell T. Co. v. Public Service Commission, 262 U. S. 276, 67 L. Ed. 981.

III.

We take no issue with the declarations of law set forth in the decisions referred to by appellant under Paragraph III of its brief. The decisions therein hold that in matters of franchise all intendments are in favor of the public and that all ambiguities in the franchise will be resolved in favor of the public and against the grantee.

As respects the matter of pleading and the sufficiency thereof, no authorities are cited. The allegations of the complaint, it is true, do not set up specifically and in detail evidentiary matter but pleads the ultimate facts.

It is also argued in this paragraph of appellant's brief that the evidence and exhibits utterly fail to connect the appellee with any franchise right whatever. We desire to call the court's attention, first, that the verified complaint which was admitted in evidence alleges:

> "That the plaintiff and its predecessors in interest at all times mentioned in the complaint and for more than twenty years last past owned, operated and maintained * * * water rights, mains and services * * * which were and now are used and useful in selling and furnishing, serving and distributing water to the inhabitants of the Cities of Reno and Sparks. * * * That plaintiff and its predecessors in interest, acting as aforesaid, have been acting under and by virtue of franchise and the right to furnish, serve, distribute and sell water to the inhabitants of the cities of Reno and Sparks. * * *"

The complaint also alleges:

> "That plaintiff and its predecessors in interest for more than twenty years last past in the operation and maintenance of its plant, pipe lines, mains and services have used the streets and alleys of said City of Reno and have laid, installed and maintained under said streets and alleys mains, pipe lines, services * * * for the purpose of furnishing, selling and distributing water to the inhabitants of the City of Reno. * * *" (Trans. pp. 3, 4)

This allegation in the verified bill is a sufficient allegation of the ultimate fact of franchise and of the use of the streets and alleys for more than twenty years for the purpose of furnishing the service by appellee and predecessors. It is also sufficient evidence to sustain the chain of title if such be necessary.

In this connection we also call the court's attention to the following statement and admission in appellant's brief:

> "Appellee and its predecessors in interest have for many years last past been and now are engaged in the business of serving and distributing water to appellant and its inhabitants and using under claim of franchise rights so to do the streets and alleys of appellant for the purpose of effecting such service and distribution." (Appellant's Brief, p. 1)

Moreover, we desire to point out to the court that no *statement of the evidence* was ever presented, filed or approved by the District Court and no statement is included in the transcript before this court.

The testimony does not become a part of the record without the approval of the Judge.

Buessel v. United States, 258 Federal 811, 823.

Where the record was not approved by the Judge it will be presumed that the court's findings were supported by evidence other than that contained in the record.

Carson v. Hurt, 250 Fed. 30, 33.

Upon the evidence presented and the fact that no statement was filed this court will conclusively presume that Sierra Pacific Power Company is a successor to the rights and franchises of the Reno Water Company and A. A. Evans. The evidence discloses (Trans. pp. 31, 32) that on December 14, 1874, and on March 5, 1879, the Board of County Commissioners of Washoe County, by orders and resolutions, granted to Reno Water Company the right of way to lay down pipes in the streets and alleys of the town of Reno (this was before the incorporation of the city). At the time of the adoption of these resolutions, under Subdivision Fourth, of Section 8 of "An Act to create a Board of County Commissioners in the several counties of this state and to define their duties and powers", approved March 6, 1865, Revised Laws, 1912, Section 1508, the County Commissioners had the power:

> "To lay out, control, and manage public roads, turnpikes, ferries, and bridges within the county, in all cases where the law does not prohibit such jurisdiction, and to make such orders as may be necessary and requisite to carry its control and management into effect."

In the situation presented by the evidence, the company undoubtedly has a property right in the use of the streets and alleys of the City of Reno.

McQuillin's Municipal Corporations, page 3566;

Boise etc. Water Co. v. Boise City, 230 U. S. 84, 57 L. Ed. 1400;

Owensboro v. Cumberland Tel. Co., 230 U. S. 58, 57 L. Ed. 1389;

Iowa Tel. Co. v. City of Keokuk, 226 Fed. 82;

Northern Ohio T. & L. Co. v. Ohio, 245 U. S. 574, 62 L. Ed. 481;

City of Covington v. Cincinnati Street Ry. Co., 246 U. S. 413, 62 L. Ed. 802.

IV.

Arguing in support of assigned error No. 4, the appellant contends that the appellee is not engaged in the business of selling water but that the title to the water is in the consumers and that the utility is a mere carrier and distributor. Appellant relies upon the case of *Prosole v. Steamboat Canal Co.,* 37 Nev. 154.

It is true that the Supreme Court of Nevada in its original opinion so decided in the case of a water company selling water to farmers and ranchers for irrigation. Upon rehearing, however, the court said:

> "Since we rendered the decision in this case, the Supreme Court of the United States has rendered the decision in the case of San Joaquin and Kings River Canal and Irrigation Company v. County of Stan-

islaus, 233 U. S. 454, 34 Sup. Ct. 665, 58 L. Ed. 1041, and in appellant's petition for rehearing reference is made to this decision. One observation made by the Supreme Court of the United States in that case is especially pertinent to the principal issue at bar, inasmuch as it supports our position taken therein. The court said: 'No doubt it is true that such an appropriation and use of the water entitled those within reach of it to demand the use of a reasonable share on payment.'

"In the San Joaquin-Stanislaus case, supra, the court, speaking through Mr. Justice Holmes, makes some very pertinent observations relative to the property rights to be recognized in favor of the party furnishing the water, where the sole object for the diversion is that of sale and distribution. As to whether or not the appellant had a property interest in the right to furnish the water is not an issue in the case at bar, and our observations made in the opinion are not to be considered as decisive of this matter."

We think this case cannot be declared to be *stare decisis* in view of the decision of the Supreme Court of Nevada upon rehearing.

May we also say in this connection that we are unable to see the pertinency of this argument and contention in the instant case.

V.

By assignments 5 and 6, the appellant takes exception to the pleadings. The lower court undoubtedly had the

right to rule upon the sufficiency of the pleadings and that ruling, we believe, will not be reviewed upon appeal from an interlocutory injunction unless the pleadings failed to state a cause of action in equity.

We submit, however, that the pleadings are sufficient and are not subject to the objection contended for by counsel. Equity rule 22, Subdivision Third, is as follows:

> "Third: a short and simple statement of the ultimate facts upon which the plaintiff asks relief omitting any mere statement of evidence."

See also equity rule 19 wherein it is provided:

> "The court at every stage of the proceeding, must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties."

We submit that the complaint complies with the rule.

VI.

The complaint in the case does not merely allege a threatened injury irreparable in character, but clearly shows facts justifying equitable interposition. The complaint alleges that the plaintiff for more than twenty years, acting under claim of right and franchise, and with the acquiescence of the city, has been using the streets and alleys of the City of Reno for its pipe lines, mains and services; that it had installed foundations and meters for the purpose of gathering and obtaining certain specific data necessary to the business of the company;

that the defendant threatened to immediately enter upon the property of the plaintiff and remove and destroy the meters and foundations. This was not merely a threatened trespass, but was a threat to enter upon property of the plaintiff and destroy or remove certain of its equipment therefrom. It was also an invasion of the franchise rights or the rights acquired by long use and by the acquiescence of the defendant, and it seems to us that there can be no question but that these facts conclusively show threatened irreparable injury for which there is no adequate remedy at law.

Hoff v. Olson, 76 N. W. 1112;
Louis v. North Kingston, 11 Atl. 173.

Where a trespass, or series of trespasses, operate in effect to destroy or seriously impair the exercise of a franchise, a court of equity will not hesitate to interpose to prevent the apprehended injury by aid of injunction.

14 *R. C. L.,* Sec. 146, page 446;
Vicksburg Water Works Co. v. Vicksburg, 185 U. S. 65, 46 L. Ed. 808;
Covington v. South Covington etc. R. Co., 256 U. S. 413, 62 L. Ed. 802;
Owensboro v. Cumberland Tel. & Tel. Co., 230 U. S. 58, 57 L. Ed. 1389;
Mutual Oil Co. v. Empire Petroleum Co., 5 Fed. (2nd) 500.

VII.

The appellant by assigned error No. 8 complains that the temporary restraining order does not comply with the act of October 15, 1914. This is undoubtedly true. But the temporary restraining order was not thereby rendered void.

Arkansas Railroad Commission v. Chicago R. I. & P. R. Co., 247 U. S. 598, 71 L. Ed. 1224.

Moreover, this objection was waived by the stipulation which was entered into April 8, 1930 (Trans. p. 22), wherein the defendants stipulated that the hearing for application for injunction be continued to April 24, 1930, and that the restraining order be continued in full force and effect until said date and until the hearing of said application for injunction. This same objection is insisted upon by assigned error No. 9 and is argued in Paragraphs VIII, IX and X. The order granting the restraining order is not an appealable order, and the error, if any, is immaterial here because it does not affect the decision of the court in granting the interlocutory injunction.

SCOPE OF REVIEW OF ORDERS GRANTING PRELIMINARY INJUNCTIONS.

This being an appeal from an order granting an interlocutory injunction, heard upon the bill, and oral and documentary testimony on behalf of plaintiff and the motion to dismiss of the defendant without answer filed, this court will consider only whether or not the judicial

discretion of the trial court was improperly exercised, assuming, of course, that jurisdiction of the cause is shown.

Farrington v. Tokushige, 273 U. S. 284, 71 L. Ed. 646;

Mutual Oil Co. v. Empire Petroleum Co., 5 Fed. (2nd) 500;

Harding v. Corn Products Refining Co., 168 Fed. 658;

State v. United States, 279 U. S. 229, 73 L. Ed. 675.

Respectfully submitted,

THATCHER & WOODBURN,
GEO. B. THATCHER,
WM. WOODBURN,
Attorneys for Appellee.

Nos. 6179, 6180, 6181, 6182

United States

Circuit Court of Appeals

For the Ninth Circuit.

LEON L. MOISE, Petitioner, vs. DAVID BURNET, Commissioner of Internal Revenue, Respondent.	No. 6179
GERALD F. SCHLESINGER, Petitioner, vs. DAVID BURNET, Commissioner of Internal Revenue, Respondent.	No. 6180
LEROY SCHLESINGER, Petitioner, vs. DAVID BURNET, Commissioner of Internal Revenue, Respondent.	Nos. 6181–6182

TRANSCRIPTS OF RECORDS.

UPON PETITIONS TO REVIEW ORDERS OF THE UNITED STATES BOARD OF TAX APPEALS.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

Nos. 6179, 6180, 6181, 6182

United States

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TRANSCRIPTS OF RECORDS.

UPON PETITIONS TO REVIEW ORDERS OF THE UNITED STATES BOARD OF TAX APPEALS.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 6179—INDEX TO TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

No. 6180—INDEX TO TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

No. 6181—INDEX TO TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

No. 6182—INDEX TO TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

No. 6179

United States

Circuit Court of Appeals

For the Ninth Circuit

LEON L. MOISE,

Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue,

Respondent.

Transcript of Record.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

No. 6179—INDEX TO TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

[1*] DOCKET No. 7453.

LEON L. MOISE, Flood Bldg., San Francisco, Calif.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPEARANCES.

For Petitioner: JEROME H. BAYER, Esq.
J. S. Y. IVINS, Esq.

For Respondent: T. M. MATHER, Esq.
A. H. MURRAY, Esq.

DOCKET ENTRIES.

1925.

Sept. 24—Petition received and filed.

Sept. 28—Copy of petition served on Solicitor.

Sept. 28—Notification of receipt mailed taxpayer.

Oct. 10—Request for field hearing filed by taxpayer.

Oct. 19—Answer filed by Solicitor.

Oct. 29—Copy of answer served on taxpayer. Assigned to field calendar.

1927.

Feb. 25—Hearing set April 29, 1927, San Francisco, Calif.

Apr. 7—Motion to amend answer filed by General Counsel, amendment tendered.

Apr. 8—Granted. Both sides notified.

*Page-number appearing at the top of page of original certified Transcript of Record.

Apr. 21—Notice of withdrawal of W. M. Smith filed.

Apr. 21—Notice of appearance of Jerome H. Bayer filed.

Apr. 27—Order consolidating this appeal with docket #7455, #8036 and #7454, said appeals to be heard and decided together in San Francisco, Cal., May 3, 1927, and placed on Circuit Cal. signed and filed. Both sides notified.

May 4—Hearing had before Mr. Van Fossan, on petitioner's motion to continue. Denied. Motion to amend petition granted. *(Petitioner's motion to dismiss except year 1920, granted.) Four cases ordered consolidated. Parties allowed until 7/1/27 to file Briefs without exchange.

June 13—Transcript of hearing May 4, 1927, filed.

June 25—Brief filed by taxpayer.

1928.

Sept. 25—Findings of fact and opinion rendered—Mr. Littleton—Judgment will be entered Rule 50.

Nov. 12—Notice of proposed redetermination, filed by G. C.

Nov. 14—Hearing set Dec. 12th on settlement.

Dec. 12—Hearing had before Mr. Milliken on settlement under Rule 50. Assigned to Mr. Littleton for order.

Dec. 15—Order of redetermination entered.

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*Stricken by order of June 10, 1930.

1929.

June 7—Notice of appearance of J. S. Y. Ivins as counsel for taxpayer filed.

[2] #7453.

June 7—Motion to fix the amount of bond at $13,500.00, filed by taxpayer.

June 7—Order fixing amount of bond at $18,000, entered.

June 11—Supersedeas bond for $18,000, approved and ordered filed.

June 11—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

June 13—Proof of service of petition for review filed.

June 17—Ordered that petitioner's amended petition submitted in #7453-54 be received and filed *nunc pro tunc* as of May 4, 1927—entered.

July 29—Motion for extension to Oct. 12, 1929, for preparation and transmission of statement of evidence, filed by taxpayer.

July 30—Order enlarging time to Oct. 12, 1929, for preparation and delivery of record—entered.

Sept. 11—Motion for extension to Nov. 25, 1929, for preparation of evidence and transmission of record filed by taxpayer.

Sept. 12—Order enlarging time to Nov. 25, 1929, for preparation and delivery of record papers entered.

Nov. 2—Motion for extension to Jan. 10, 1930, to prepare and deliver statement of evidence—filed by taxpayer.

Nov. 6—Order enlarging time to Jan. 10, 1930, for preparation of evidence and delivery of record papers entered.

1930.

Jan. 2—Order from U. S. Circuit Court of Appeals (9) enlarging time to Feb. 10, 1930, for preparation and delivery of record filed.

Feb. 10—Motion for extension to March 10, 1930, for settlement of evidence and transmission of record filed by G. C.

Feb. 12—Praecipe with proof of service thereon filed.

Feb. 12—Agreed statement of evidence lodged. Approved and ordered filed Feb. 15, 1930.

Feb. 10—Order enlarging time to May 1, 1930, for preparation of evidence and transmission and delivery of record entered.

Mar. 8—Transcript of record *sur* petition for review sent to Clerk U. S. Circuit Ct. of Appeals, Ninth Circuit.

May 2—Certified copy of order enlarging time to June 2, 1930, to prepare and deliver record filed.

June 2—Copy of order from U. S. Circuit Court of Appeals, Ninth Circuit, granting extension to July 1, 1930, to prepare and deliver record filed.

June 10—Motion to correct docket entry of May 4, 1927, filed by taxpayer. Granted.

Now, June 11, 1930, the foregoing docket entries are certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, Board of Tax Appeals.

[Endorsed]: Filed Jul. 1, 1930. Paul P. O'Brien, Clerk.

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[3] Filed Sept. 24, 1925.

United States Board of Tax Appeals.

DOCKET No. 7453.

Appeal of LEON L. MOISE, Flood Building, San Francisco, Calif.

PETITION.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter IT:PA: 4-60-D-GWF-406 dated July 29, 1925, and as the basis of his appeal sets forth the following:

1. The taxpayer is an individual with his place of business in the Flood Building, San Francisco, California. He was formerly a member of the copartnership Schlesinger and Bender with its principal office at the same address.
2. The deficiency letter (a copy of which is attached) was mailed to the taxpayer on July 29, 1925.

3. The taxes in controversy are income taxes for the calendar years 1918, 1919 and 1920 and are less than $10,000.00, to wit, $1,379.78, excepting for any adjustment which will be rendered necessary upon the Treasury Department's acceptance of California taxpayers' returns filed on a community property basis.

4. The determination of tax contained in the said deficiency letter is based upon the following error:

   (a) Failure by the Commissioner to allow as a deduction from income in the tax returns filed by Schlesinger and Bender a loss amounting to $13,947.42 sustained in the calendar years 1918, 1919 and 1920, due to the enactment of prohibition legislation, thus increasing the *pro rata* share of partnership income taxable to the taxpayer.

5. The facts upon which the taxpayer relies as the basis of his appeal are as follows:

   (a) In its tax return for the six months period ending December 31, 1918, the copartnership Schlesinger and Bender claimed as a deduction the sum of $21,848.60 as exhaustion wear and tear (including obsolescence) of tangible properties. This sum consisted of the following balances:

[4] Unamortized balance of buildings on leased ground account.....$ 7,200.00

Balance of cooperage, furniture and fixtures account	13,965.03
Additional depreciation not charged on books (details not now available).	683.57
Total as above	$21,848.60

(b) In its tax return for the calendar year 1920 the copartnership of Schlesinger and Bender reported as income the sum of $7,801.18 being the total proceeds from the sales of cooperage, scrap and office furniture.

(c) The Commissioner in his letter dated October 22, 1924, file IT:PA:4–GWF–406 allowed as a deduction to Schlesinger and Bender obsolescence of goodwill amounting to $52,814.70 apportionable between the years 1918, 1919 and 1920 as follows:

1918	12/37	$17,129.09
1919	24/37	34,258.19
1920	1/37	1,427.42
	As above	$52,814.70

(d) The deduction mentioned in paragraph 5 (a) above as originally claimed by the copartnership was in error and, as in paragraph 4 above, the correct deductible amount is $13,-947.42 made up as follows:—

Unamortized balance of buildings on

leased ground, reverted to lessor January 16 1920			$ 7,2
Cooperage, furniture, fixtures etc., book value	$13,965.03		
Less:			
Proceeds of sales originally reported as income in the year 1920	$7,801.18		
Estimated value of office furniture retained	100.00	7,901.18	6,0
Additional depreciation not charged in books. The details of this item are not now available but the amount is reasonable because no other depreciation was claimed			6
Total			$13,9

[5] The above amount should, it is believed, be apportioned in the same manner as that used by the Commissioner in apportioning the deduction for obsolescence of goodwill as in 5 (c) above, as follows:

1918	12/37	$4,523.49
1919	24/37	9,046.98
1920	1/37	376.95
Total as above		$13,947.42

6. The taxpayer, in support of his appeal relies upon the following propositions of law:

(a) That in computing net income there shall be allowed as deductions:

(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business. Section 214 (a) Revenue Act of 1918.

(b) That in computing net income there shall be allowed as deductions:

(8) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. Section 214 (a) Revenue Act of 1918.

WHEREFORE the taxpayer respectfully prays that this Board may hear and determine this appeal.

W. M. SMITH,
Counsel for Taxpayer.

Address: 505 Transportation Bldg.,
Washington, D. C.

leased ground, reverted to lessor January 16 1920			$ 7,2
Cooperage, furniture, fixtures etc., book value	$13,965.03		
Less:			
Proceeds of sales originally reported as income in the year 1920	$7,801.18		
Estimated value of office furniture retained	100.00	7,901.18	6,0
Additional depreciation not charged in books. The details of this item are not now available but the amount is reasonable because no other depreciation was claimed			6
Total			$13,9

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1918	12/37	$4,523.49
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(b) That in computing net income there shall be allowed as deductions:

(8) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. Section 214 (a) Revenue Act of 1918.

WHEREFORE the taxpayer respectfully prays that this Board may hear and determine this appeal.

W. M. SMITH,
Counsel for Taxpayer.
Address: 505 Transportation Bldg.,
Washington, D. C.

Form NP–2.

[6] TREASURY DEPARTMENT,
Washington.

Office of
Commissioner of Internal Revenue
IT:PA:4–60D.
GWF–406.

July 29, 1925.

Mr. Leon L. Moise,
612 Flood Building,
San Francisco, California.

Sir:

The determination of your income tax liability for the years 1918, 1919 and 1920, as set forth in office letter dated October 22, 1924, disclosed a deficiency in tax amounting to $5,032.29.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do

not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:4–60D–GWF:406. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,
D. H. BLAIR,
Commissioner,
By C. B. ALLEN,
Acting Deputy Commissioner.

Inclosures:
Statements.
Agreement—Form A.

[7] STATEMENT.

IT:PA:4–60D.
GWF–406.

In re: Mr. Leon L. Moise,
612 Flood Building,
San Francisco, California.

Years.	Deficiency in Tax.
1918 (waiver)	$ 561.86
1919 (")	4,320.62
1920	149.81
Total	$5,032.29

An audit of the 1918 partnership return of Schlesinger and Bender discloses your distributive

interest to be $20,912.93, instead of $19,339.76, or a difference of $1,573.17, which is subject to normal tax at 12%, or $188.78.

The adjustments made in the partnership income are fully explained in a separate communication to Schlesinger and Bender.

It is noted that $29,965.08 was reported on Line J, $85.87 or Line K (b) and $28,879.21 on Line L, whereas the total of $29,965.08 and $85.87 is $30,-050.95 or a difference of $1,171.74.

The total increase in the income subject to surtax is $2,744.91 upon which there is due surtax of $373.08, computed at the rates of 13% no $1,120.79 and 14% on $1,624.12.

There is therefore a total deficiency of $561.86 for the year 1918.

An audit of the 1919 return of Schlesinger and Bender discloses your distributive interest from this partnership to be $16,523.65 instead of a loss of $9,717.88. The adjustment of this item increases your net income by $26,241.53.

The tax liability on your corrected net income of $33,049.79 is $4,527.85, and as $207.23 was assessed there is a deficiency of $4,320.62 for 1919.

[8] Statement.

Mr. Leon L. Moise.

An audit of the 1920 return of Schlesinger and Bender discloses your distributive interest to be $13,342.16 instead of $12,248.96 or a difference of $1,093.20.

The items of income, reported on your return, were totaled as $12,348.95 whereas the correct

amount is $12,427.46. The correction of this error increases your net income by $78.51.

The total increase in your net income is $1,171.71 which is subject to normal tax at 8% or $93.74, and surtax of $56.07, computed at the rates of 4% on $251.05 and 5% on $920.66.

There is, therefore, a total deficiency of $149.81 for the year 1920.

After consideration of your protest by the Solicitor of Internal Revenue, the Unit is sustained with respect to this deficiency.

The facts contained in your letter of July 8, 1925, have been given due consideration in determining the within deficiency.

[9] State of California,
City and County of San Francisco.

Leon L. Moise, being duly sworn, says that he is the taxpayer mentioned in the foregoing petition; that he has read the said petition, or had the same read to him, and is familiar with the statements therein contained, and that the facts therein stated are true, except such facts as are stated to be upon information and belief, and those facts he believes to be true.

LEON L. MOISE.

Sworn before me this 15th day of September, 1925.

[Seal] L. P. LOVELAND,
Notary Public, in and for City and County San Francisco, State of California.

Now, March 1, 1930, the foregoing Petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[10] Filed Oct. 19, 1925, United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 7453.

Appeal of LEON L. MOISE, San Francisco, California.

ANSWER.

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of the above-named taxpayer, admits, denies and alleges as follows:

(1) Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

(2) Denies that any error was made in the determination of the deficiency in tax set out in the letter of July 29, 1925.

(3) Admits that in its tax return for the period ending December 31, 1918, the copartnership claimed as a deduction the sum of $21,848.60 as exhaustion, wear and tear of tangible properties.

(4) Admits the allegations contained in subparagraphs (b) and (c) of paragraph 5.

(5) Admits that the deduction of $21,848.60 claimed by the taxpayer in its return for the period

ending December 31, 1918 was erroneous; denies that the correct amount is $13,947.42 and further denies that the taxpayer is entitled to any deduction on account of obsolescence of its tangible property.

(6) Denies, generally and specifically, each and every allegation in the taxpayer's petition contained not hereinbefore admitted, qualified or denied.

[11] PROPOSITION OF LAW.

The taxpayer is not entitled to any deduction on account of its obsolescence of its tangible properties.

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.

Of Counsel:

M. N. FISHER,
Special Attorney,
Bureau of Internal Revenue.

Now, March 1, 1930, the foregoing Answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[12] Recd. Apr. 7, 1927. United States Board of Tax Appeals.
Filed Apr. 8, 1927.

United States Board of Tax Appeals.

DOCKET No. 7453.

LEON L. MOISE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

AMENDED ANSWER.

The Commissioner of Internal Revenue by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits, and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Denies the allegations contained in paragraph 3 of the petition, and alleges that the amount of taxes in controversy are income taxes for the calendar years 1918, 1919, and 1920 and are less than $10,000.00, to wit, $5,980.77.

4. (a) Denies that the Commissioner erred in the determination of said taxes as alleged in subdivision (a) of paragraph 4, of the petition; and, alleges that the Commissioner erred by not including

in the petitioner's income for the year 1918, $5,-709.70, for the year 1919, $11,419.39, and for the year 1920, $475.60, said amounts being the petitioner's distributive interest in $52,814.70, deducted for the taxable years 1918, 1919, and 1920, by Schlesinger and Bender as obsolescence of goodwill.

5. (a). Admits that in its tax return for the period ended December 31, 1918, the copartnership claimed as a deduction the sum of $21,848.60, as exhaustion, wear and tear of tangible properties.

5. (b) Admits the allegations contained in subdivision (b) of paragraph 5, of the petition.

[13] 5. (c) Admits the allegations contained in subdivision (c) of paragraph 5, of the petition, and alleges that the obsolescence of goodwill amounting to $52,814.70 deducted by Schlesinger and Bender as alleged in subdivision (c) of paragraph 5 of the petition is not an allowable deduction of said copartnership.

5. (d) Admits that the deduction of $21,848.60 claimed by the copartnership in its return for the period ending December 31, 1918, was erroneous. Denies that the correct amount deductible is $13,-947.42, and further denies that the copartnership is entitled to any deduction for obsolescence of its tangible property.

Denies generally and specifically each and every other allegation contained in the petition of the above-named taxpayer not hereinbefore expressly admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal be denied.

A. W. GREGG,
General Counsel,
Attorney for the Commissioner of Internal Revenue.

Of Counsel:
THOMAS. M. MATHER,
Special Attorney,
Bureau of Internal Revenue.

Now, March 1, 1930, the foregoing Amended Answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, Board of Tax Appeals.

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[14] United States Board of Tax Appeals.

DOCKET No. 7453.

LEON L. MOISE,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AMENDMENT TO PETITION.

Leave from United States Board of Tax Appeals, first being had and obtained the petitioner in the above-entitled and numbered cause, hereby files thw following amendment to the petition now on file herein, and by way of such amendment adds

to and includes in said petition the following allegation:

Petitioner further alleges by way of appeal, that all of the alleged deficiencies and taxes claimed or set forth in the said deficiency letter upon which this appeal is predicated and all alleged deficiencies and taxes claimed or set forth in the Answer and Amendment Answer of the Commissioner of Internal Revenue herein, are forever barred by and under, the provisions of, and periods of limitations contained in, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1919, the Revenue Act of 1920, the Revenue Act of 1921, the Revenue Act of 1924, and the Revenue Act of 1926, and particularly Section 277 of said last-named Act.

WHEREFORE, the petitioner respectfully prays that this Board may hear and determine his appeal.

JEROME H. BAYER,
Counsel for Petitioner.

State of California,
City and County of San Francisco.

Leon L. Moise, being duly sworn, deposes and says that he is the petitioner above named; that he has read the foregoing amendment, or had the same read to him, and is familiar with the statements contained therein and that the facts stated therein are true except such facts as are stated to be upon information and belief and those facts he believes to be true.

LEON L. MOISE.

Sworn to before me this 3d day of May, 1927.

[Seal] J. J. KERRIGAN,

Notary Public in and for the City and County of San Francisco.

Now, March 1, 1930, the foregoing amendment to petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,

Clerk, U. S. Board of Tax Appeals.

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[15] DOCKET Nos. 7453 and 7454.

LEON L. MOISE, GERALD F. SCHLESINGER,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER.

It appearing from the record that on May 4, 1927, on motion of petitioner, without objection by respondent, leave was granted petitioner to file amended petitions or amendments to petitions in each of the proceedings, Docket Nos. 7453, 7454, 7454, 7455 and 8036. Thereafter petitioner submitted petitions in Docket Nos. 7455 and 8036 which were duly filed as of May 4, 1927, and has now submitted amended petitions in Docket Nos. 7453 and 7454. It appearing that the amended petitions in the foregoing mentioned proceedings are such amendments as were authorized May 4,1927, it is

ORDERED that petitioner's amended petition submitted in Docket Nos. 7453 and 7454 be received and filed *nunc pro tunc* as of May 4, 1927.

(Signed) BENJAMIN H. LITTLETON,
Member, U. S. Board of Tax Appeals.

Dated Washington, D. C., June 17, 1929.

A true copy.

[Seal] Teste: B. D. GAMBLE,
Clerk, U. S. Board Tax Appeals.

Now, March 1, 1930, the foregoing Order certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[16] United States Board of Tax Appeals, Washington.

DOCKET No. 7453.

LEON L. MOISE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER FOR CONSOLIDATION OF APPEALS.

It appearing that the above-entitled appeal has been set down for hearing upon the Circuit Calendar upon Friday, April 29, 1927, and the appeal entitled "Leroy Schlesinger, Petitioner, vs. Commissioner of Internal Revenue, Respondent,"

Docket No. 7455, has been set down for hearing upon the Circuit Calendar upon Tuesday, May 3, 1927, and the appeal entitled "Leroy Schlesinger, Petitioner, vs. Commissioner of Internal Revenue, Respondent," Docket No. 8036, has been set down for hearing upon the Circuit Calendar upon Tuesday, May 3, 1927, and the appeal entitled "Gerald F. Schlesinger, Petitioner, vs. Commissioner of Internal Revenue, Respondent," Docket No. 7454, has been set down for hearing upon the Circuit Calendar upon Tuesday, May 3, 1927, all of said hearings having been scheduled upon said Circuit Calendar to be held at San Francisco, California; and

It appearing that the issues involved in each of said four appeals arises out of the same matter,—

NOW, THEREFORE, upon motion of the taxpayer Leon L. Moise, heretofore made, it is hereby ordered as follows:

That the above-entitled appeal and the other three appeals aforementioned, and the hearings thereof, all be consolidated, and that said four appeals be heard and decided together, and that the hearings of all of said four appeals be held together in one proceeding at the same time and place, to wit, at Room 154 City Hall, San Francisco, California, at 9:30 o'clock A. M. on Tuesday, May 3, 1927, and that they accordingly be placed on the Circuit Calendar for said time and place.

Dated: April 27, 1927.

JOHN J. MARQUETTE.

A true copy.

Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Now, March 1, 1930, the foregoing Order for Consolidation of Appeals certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[17] A true copy.

Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET Nos. 7453, 7454, 7455, 8036.

Promulgated September 25, 1928.

LEON L. MOISE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

GERALD F. SCHLESINGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

LeROY SCHLESINGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Written consents filed with the Commissioner but approved by the Commissioner subsequent to the expiration of the statutory period of limitation are effectual in preventing a bar to the assessment and/or collection of taxes. Joy Floral Company, 7 B. T. A. 800, followed.

The evidence is insufficient to warrant deduction for obsolescence of tangible property.

The Commissioner erred in allowing a deduction for obsolescence of goodwill and his affirmative allegations to that effect in amended answers to the petitions constitute a claim for an increased deficiency under section 274 (e) of the Revenue Act of 1926.

JEROME H. BAYER, Esq., for the Petitioner.

T. M. MATHER, Esq., for the Respondent.

The Commissioner determined deficiencies in income tax as follows:

	Docket No.	1918	1919	1920
Leon L. Moise	7453	$561.86	$4,320.62	$149.81
Gerald F. Schlesinger	7454	409.02	4,248.94	——
LeRoy Schlesinger	7455	——	——	153.08
LeRoy Schlesinger	8036	414.99	——	——

The proceedings were consolidated for hearing and decision.

The issues involved, identical in all proceedings, are:

(1) Whether or not the assessment and collection of the deficiencies herein alleged are barred by the statute of limitations.

[18] (2) Whether or not in determining the net income of the partnership of which the petitioners were members and consequently would be taxable on its distributive shares, obsolescence on leasehold improvements and equipment is an allowable deduction from gross income.

(3) Whether or not the Commissioner has made a valid assertion of a claim for an increase in the deficiencies under section 274(e).

(4) Whether or not in determining the net income of the partnership of which the petitioners were members obsolescence of goodwill is an allowable deduction from gross income. The Commissioner originally allowed deduction for obsolescence of goodwill, but now claims he erred in so doing.

FINDINGS OF FACT.

Leon L. Moise, Gerald F. Schlesinger and LeRoy Schlesinger were equal partners in the firm of Schlesinger and Bender of San Francisco, California, which was engaged in the wholesale liquor business from the time of its formation, July 1, 1918, until January 16, 1920, the date of its dissolution and termination of business. For many years prior to the formation of the partnership, the liquor business of the three individuals had been conducted in

the same location as a corporation. The premises and plant occupied by the partnership in the conduct of its wholesale liquor business were acquired under the terms of a lease entered into in 1910 between H. Levi & Co., a California corporation, lessor, and Schlesinger and Bender, Inc., a California corporation, lessee. The principal terms of the lease provided for the use of certain land and buildings thereon by the lessee or its assigns at a fixed monthly rental for the period of 15 years. The lease also provided that all additions such as improvements and fixtures should be made at the lessee's expense and at the cancellation or termination of the lease should revert to the lessor. The lease further provided that no business other than that of the lessee should be conducted on the premises.

[19] Believing that it would be compelled to terminate its business in 1920 by reason of national prohibition legislation, and believing that its leasehold improvements and equipment would be wholly obsolete at that time, the partnership charged off its books as a loss on December 31, 1918, the amounts of $7,200, the balance remaining in its "Building" account, and $13,965.03, the balance remaining in its "Furniture and Fixtures" account.

Upon closing its affairs early in 1920 the partnership sold its furniture and equipment, but no entries of such sales were made on its books. The lease by virtue of which the partnership occupied its business property was terminated about April 1, 1930, and shortly thereafter the premises were vacated.

The partnership filed returns for the period July 1, 1918, to December 31, 1918, and for the years 1919 and 1920.

In its return for the six months' period July 1, 1918, to December 31, 1918, the partnership claimed as a deduction from gross income the sum of $21,-848.60 as exhaustion, wear and tear (including obsolescence) of its tangible properties. The Commissioner disallowed this sum as a deduction and refused to allow any amount as a deduction for the obsolescence of tangible property of the partnership.

In its return for the year 1920, the partnership included in its gross income that year the sum of $7,801.18 representing the proceeds received from sales of cooperage, scrap, and office furniture.

In its returns filed for the period July 1, 1918, to December 31, 1918, and for the years 1919 and 1920, the partnership claimed certain amounts therein as deductions from gross income for the obsolescence of goodwill. The Commissioner, in a letter dated October 22, 1924, signed by A. Lewis, head of division, and addressed to Schlesinger and Bender and received by it, informed the partnership that the correct amount of $52,814.70 was allowed the partnership as obsolescence of goodwill for prohibition purposes, and [20] indicated its distribution over the three years 1918, 1919 and 1920.

Each of the petitioners involved in these proceedings filed individual income tax returns covering the years in which deficiencies have been asserted.

The return of Leon L. Moise for the year 1918 was filed with the Collector in the First District of

California not later than March 15, 1919. His return for the year 1919 was filed with the Collector in the same district of California not later than March 15, 1920.

An undated income and surtax written consent covering 1918 and expiring March 1, 1925, bearing the purported signatures of Leon L. Moise and D. H. Blair, Commissioner, acknowledged January 4, 1924, was filed with the Commissioner. An income and profits tax consent for 1918 dated February 3, 1925, and expiring December 31, 1925, was executed and filed by the same petitioner. The said petitioner also signed a written consent covering 1919, dated February 3, 1925, and expiring December 31, 1925. Both of the two last-mentioned consents were stamped approved March 25, 1925, and signed by D. H. Blair, Commissioner of Internal Revenue.

The return of Gerald F. Schlesinger for the year 1918 was filed with the Collector at Chicago, Illinois, not later than March 22, 1919. This return bears the stamp "Collector of Internal Revenue, Paid March 15, 1919, Cashier—A, Chicago, Illinois," It also bears the stamp "Collector Int. Rev. March 22, 1919." This return was sworn to under date of March 20, 1919. The return for the year 1919 was filed with the Collector in the First District of California, March 15, 1920.

An income and surtax waiver dated February 25, 1924, covering 1918 and expiring March 1, 1925, and bearing the purported signatures of Gerald F. Schlesinger and D. H. Blair, Commissioner, was filed with the Commissioner. An income and profits

tax waiver for 1918, dated February 3, 1925, and expiring December 31, 1925, was signed by Gerald F. Schlesinger and filed on [21] the said date. He likewise signed an income and profits tax waiver covering 1919 dated January 30, 1925, and expiring December 31, 1925. Both of the two last-mentioned waivers were stamped approved March 25, 1925, and signed by D. H. Blair, Commissioner of Internal Revenue.

The return of LeRoy Schlesinger for the year 1918 was filed with the Collector in the First District of California not later than March 15, 1919.

The petitioner, LeRoy Schlesinger, executed an undated income and surtax waiver for the year 1918 expiring March 1, 1925. This document was accepted on January 4, 1924, and bears on its reverse side the stamp "Personal Audit #4, September 19, 1924, Received."

On July 29, 1925, the respondent issued 60-day letters to petitioners Moise and Gerald F. Schlesinger, notifying them of his final determination of the deficiencies hereinabove set forth. On September 4, 1925, the respondent notified petitioner LeRoy Schlesinger that his claim for abatement had been rejected.

Petitioners allege in paragraph 5 (c) of their petitions as follows:

> The Commissioner in his letter dated October 22, 1924, file IT:PAP4—GWF—406 allowed as a deduction to Schlesinger and Bender obsolescence of good will amounting to $52,814.70 apportionable between the years 1918, 1919 and 1920 as follows:

1918	12/37	$17,129.09
1919	24/37	34,258.19
1920	1/37	1,427.42
	As above	$52,814.70

Upon motions made and duly granted by the Board, the Commissioner filed amended answers in each of these proceedings, in paragraph 4 (a) of which he denies that he had erred in refusing to allow a deduction from gross income of the partnership of which the petitioners were members for obsolescence of tangible property and affirmatively alleged in Docket 8036, LeRoy Schlesinger, "that the Commissioner erred in not including in the petitioner's income for the year 1918, $5,709.70 and for the year 1919, [22] $11,419.39, said amounts being the petitioner's distributive interest in $52,814.70 deducted for the taxable years 1918 and 1919 by Schlesinger and Bender as obsolescence of goodwill."

In paragraph 5 (c) of his amended answer in this proceeding the Commissioner states as follows:

> Admits the allegations contained in subdivision (c) of paragraph 5 of the petition, and alleges that the obsolescence of goodwill amounting to $52,814.70 deducted by Schlesinger and Bender as alleged in subdivision (c) of paragraph 5 of the petition is not allowable deduction to said co-partnership.

In the amended answer in Docket 7453, Leon L. Moise, the Commissioner denied that he had erred as alleged in paragraph 4 (a) of the petition and

"alleged that the Commissioner erred by not including in the petitioner's income for the year 1918, $5,709.70, for the year 1919, $11,419.39, and for the year 1920, $475.80, said amounts being the petitioner's distributive interest in $52,814.70, deducted for the taxable years 1918, 1919 and 1920, by Schlesinger and Bender as obsolescence of goodwill." And, in paragraph 5 (c) of his amended answer in this proceeding, stated as set forth above by the amended answer in Docket 8036, LeRoy Schlesinger. The Commissioner alleged and admitted as set forth above in the proceeding of this taxpayer in Docket 7455.

The amended answer in proceeding of Gerald F. Schlesinger, Docket No. 7454, contained the same admissions and allegations as first above set forth in the proceeding of LeRoy Schlesinger, Docket 7455.

These amended answers, after specifically admitting and denying every allegation of the petition, conclude as follows:

> "Denies generally and specifically each and every other allegation contained in the petition of the above-named taxpayer not hereinbefore expressly admitted, qualified or denied. WHEREFORE, it is prays that the appeal be denied."

At the hearing of these proceedings counsel for the Commissioner contended for an increase of deficiencies upon the affirmative allegations in the amended [23] answers in respect of the deduction of obsolescence for goodwill.

OPINION.

LITTLETON.—The first contention of the petitioners is that the various written consents filed are ineffective for the reason that they were approved by the Commissioner after the expiration of the five-year period within which the Commissioner could make assessments for the respective years involved.

The Board has previously held that a consent executed after the five-year period has expired is valid and that taxes may be assessed within the period of such consent. Joy Floral Co., 7 B. T. A. 800. Upon the authority of that decision, the contentions of all petitioners with respect to the issue of the statute of limitations are denied. See also Friend M. Aiken, 10 B. T. A. 553, and Sugar Run Coal Mining Co., 11 B. T. A. 587.

At the hearing the petitioners Leon L. Moise and Gerald F. Schlesinger contended that the original written consents covering 1918 and expiring March 1, 1925, were neither signed nor authorized by them. However, the said petitioners admitted having filed consents for 1918, dated February 3, 1925, and January 30, 1925, respectively, and expiring December 31, 1925. Whatever may have been the fact as to the original consents, there is no question as to the validity of the later ones. These properly signed consents effectively extended the period fixed by law.

The second issue presented for decision is whether or not in determining the net income of the partnership of which the petitioners were members, obso-

lescence of its tangible assets is allowable as a deduction from gross income.

The first difficulty in granting the petitioners' contention on this point lies in the insufficiency of evidence as to the value of the tangible assets on account of which obsolescence is claimed. The principal evidence presented as to these values was the ledger of the partnership, which showed [24] a balance in the "Building" account at December 31, 1918, of $7,200 and in the "Furniture & Fixtures" account a balance of $13,965.03. One of the petitioners testified that the $7,200 in the "Building" account represented money which had been expended "in building vats and fixtures and also building a cellar in the building which we had leased," but from an examination of the ledger account it appears that this statement does not mean more than that costs of the character referred to were entered in this account and that after adjustments for depreciation, and possibly for other reasons, the balance of $7,200 remained.

In neither instance do we know how such book values were computed. We have no proof of costs or appropriate rates of depreciation, nor do we have a segregation or identification of the assets upon which the obsolescence was predicated. Neither have we the amount sold or salvaged from the furniture and equipment in 1920. Thus, we have no basis on which to determine the amount of obsolescence in either instance. In the absence of evidence the petitioner's contention under this issue must be denied. Star Brewing Co., 7 B. T. A. 377.

The third issue is whether the Commissioner

erred in allowing the partnership of Schlesinger and Bender a deduction for obsolescence of goodwill and whether by the affirmative allegations in his amended answers he has effectively asserted a claim for increased deficiencies.

Section 274 (e) provides:

> The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

Rule 14 of the Board's Rules of Practice provides in part that "the answer shall be so drawn as fully and completely to advise the petitioner and the [25] Board of the nature of the defense. It shall contain a specific admission or denial of each material allegation of fact contained in the petition and shall set forth any new matters upon which the Commissioner relies for defense or affirmative relief."

We are of opinion that the Commissioner has, by his amended answers, effectively asserted a claim for increased deficiencies within the meaning of section 274 (e) of the Revenue Act of 1926. The petitioners allege that the Commissioner allowed the partnership a deduction totalling $52,814.70 for obsolescence of goodwill. The Commissioner admits that he did this and affirmatively alleges that

he erred in so doing and that he erred in not including in the income of each of the petitioners his distributive share of the profits of the partnership without any allowance for obsolescence of goodwill since obsolescence of goodwill is not an allowable deduction from gross income.

It is clear from those allegations that the Commissioner is asserting a claim in each proceeding for a deficiency in excess of the amount originally determined by him. It is not necessary that the claim by the Commissioner for a deficiency in excess of the amount originally determined by him, or for a penalty, additional amount or addition in tax be asserted in any particular language. A sufficient claim has been made if the Commissioner affirmatively alleges error in his original determination together with facts sufficient, if proved, to result in an increase of the net income and the tax of the petitioner over that originally determined by him.

There is no dispute as to the facts relative to the deductions originally allowed by the Commissioner for obsolescence of goodwill. The claim of the Commissioner that he erroneously allowed the partnership deductions for obsolescence of goodwill for the years involved and that the distributive share of the petitioners of the net income of the partnership should be [26] increased accordingly is well taken. Red Wing Malting Co., 8 Fed. (2d) 108; 15 Fed. (2d) 626; Manhattan Brewing Co., 6 B. T. A. 952.

Reviewed by the Board.

Judgment will be entered under Rule 50.

VAN FOSSAN, Dissenting.—I am unable to agree with the prevailing opinion on the third issue of the case. This issue involved the determinaton of whether or not the Commissioner has effectively asserted the claim for the additional amount or addition to the tax beyond that set forth in the original notices of deficiencies.

Section 274(e) provides:

> The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed, *if claim* therefor *is asserted* by the Commissioner at or before the hearing or a rehearing. (Italics ours.)

As I read this section, the assertion of a claim for the additional amount or addition to the tax is a prerequisite to the finding by the Board of such additional amount. There are sound considerations of justice and fairness back of such a provision. Petitioner, upon receipt of a notice of a specific deficiency, prepares his petition in reliance on the representations as to the Government's contentions set forth in the notice. His petition is specifically addressed to those contentions and his preparations to contest the deficiency are confined thereto. Section 274(f) specifically forbids, in cases subsequently arising, the determination of an additional defi-

ciency except in case of fraud or as provided in section 274(e), *supra,* or in case of a jeopardy assessment under section 279(c). By this prohibition Congress has indicated its dispositon to protect the taxpayer from repeated deficiency notices covering the same year [27] or from uncertainty in the issues which he is called on to meet. If the Government proposes a greater deficiency under section 274(e), I believe the taxpayer is entitled to demand that the statute be strictly complied with and that it be construed strictly against the Government. He should not be left to infer the asserting of a claim from the general tenor of affirmative allegations of the amended answer.

In the proceedings under consideration the Commissioner has not asked directly for affirmative relief from his alleged error. He made no motion to increase the deficiency appealed from. Upon permission to amend the answers he incorporated affirmative allegations that he had erroneously allowed obsolescence. The prayer of his answer is that the proceedings be dismissed. He now askes us to hold that this allegation of error on his part constitutes the assertion of a claim for additional tax under the statute. With this I cannot agree. In such a situation the taxpayer is entitled to shield himself behind every defense the law affords. The law has provided that a claim shall be asserted for the additional amount of tax. Considering the purpose and language of the statute this provision would seem to require an affirmative act of assertion. Nothing so vital to the rights of a taxpayer

as the finding of a greater deficiency should be left to implication. The proper assertion of a claim is not a difficult task if directly essayed. A motion could have been made at any time during the hearing. On [28] the other hand, to infer or imply the assertion of a claim in the instant cases will open the door to loose pleadings and place on the Board in other cases the burden of interpreting the mind of the Commissioner. The statute provides a simple procedure, and having failed to avail himself thereof, the Commissioner has no basis for complaint.

In my opinion respondent has not effectively or properly asserted a claim for the additional amount or addition to the tax as required by law.

LANSDON agrees with this dissent.

Now, March 1, 1930, the foregoing findings of fact and opinion certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[29] United States Board of Tax Appeals.

DOCKET No. 7453.

LEON L. MOISE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER OF REDETERMINATION.

Pursuant to the Board's findings of fact and opinion promulgated September 25, 1928, it is

ORDERED AND DECIDED that there are deficiencies in tax in respect of the above-entitled petitioner of $2,146.41, $7,275.23, and $211.66 for the years 1918, 1919 and 1920, respectively.

(Signed) B. H. LITTLETON,
Member, U. S. Board of Tax Appeals.

Dated Washington, D. C.
Entered Dec. 15, 1928.

A true copy.

Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Now, March 1, 1930, the foregoing Order of Redetermination certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[30] Filed June 11, 1929.

In the United States Circuit Court of Appeals for the Ninth Circuit.

LEON L. MOISE,
Petitioner and Appellant,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee.

PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes Leon L. Moise, the above-designated petitioner and appellant (hereinafter called petitioner), and files this petition for the review of the findings of fact and opinion of the United States Board of Tax Appeals in the Appeal before said Board designated therein as Docket 7453, promulgated on the 25th day of September, 1928, and the decision and order of redetermination of said Board rendered and entered in said appeal on the 15th day of December, 1928, approving, redetermining and fixing deficiencies in income tax of the petitioner for the calendar years 1918, 1919 and 1920 in the amounts of $2,146.41, $7,275.23 and $211.66 respectively, and your petitioner respectfully shows:

[31] I.

STATEMENT OF THE NATURE OF THE CONTROVERSY.

The respondent and appellee (hereinafter called respondent) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States of America.

The said petitioner and appellant (hereinafter called petitioner) made his return of income taxes with respect to his income for the years 1918, 1919

and 1920 to the Collector of Internal Revenue at San Francisco, California, nor later than March 15th, 1919, 1920 and 1921 respectively.

Respondent notified petitioner by means of a sixty-day letter dated July 29, 1925, that a deficiency was disclosed in his tax return for the years 1918, 1919 and 1920, totaling $5,032,29. This deficiency arose primarily out of the disallowance of a deduction for obsolescence of tangible assets of the partnership of Schlesinger & Bender, of which petitioner was a member. This firm was engaged in the wholesale liquor business, with its principal place of business at San Francisco, California. The premises which it occupied were leased premises. The partnership was obliged to, and did terminate its business in January, 1920, by reason of prohibition legislation, which resulted in the obsolescence both of the tangible assets and goodwill of the partnership. A deduction for obsolescence of goodwill was allowed to said partnership by the Commissioner of Internal Revenue. A deduction for obsolescence of tangible assets was made upon the return [32] filed by the partnership for the year 1918. This deduction was disallowed by the Commissioner as set forth in said sixty-day letter dated July 29, 1925, from which letter petitioner took an appeal within the time and in the manner provided by law to the United States Board of Tax Appeals. This appeal was designated in the files of said Board as Docket No. 7453. The said appeal was decided by said Board adversely to said petitioner. It is the proceedings, findings of fact, opinion, deci-

sion and order of redetermination of said Board in that appeal which petitioner now seeks to have reviewed and reversed by this Honorable Court. The questions considered or ruled upon by said United States Board of Tax Appeals in said appeal, as well as the questions arising out of the actions, rulings, findings of fact, opinion, decision, and order or redetermination of said Board therein, are substantially as follows:

> Whether or not a form of written consent or waiver executed by a taxpayer, is effective to extend the statutory period of limitation for the assessment and/or collection of taxes, without or before, the approval thereof by the Commissioner of Internal Revenue.
>
> Whether or not a form of written consent or waiver executed and/or filed by a taxpayer after the expiration of the statutory period of limitation for the assessment and/or collection of taxes, is valid and effective.
>
> Whether or not a written consent or waiver filed with the Commissioner within the statutory period of limitations, but not approved by the Commssioner until after the expiration of said statutory period, is effective.
>
> Whether or not the Commissioner of Internal Revenue had the right to file an amended answer in said appeal, without prior notice to said petitioner [33] and without prior opportunity of said petitioner to be heard with respect thereto.
>
> Whether or not the Commissioner had the

right to insert in his amended answer in said appeal new matter and matter not mentioned or referred to or incorporated in his sixty-day letter to petitioner, from which letter said appeal was taken.

Whether or not said United States Board of Tax Appeals had jurisdiction to determine alleged deficiencies additional to or greater or other than the alleged deficiency set forth in the sixty-day letter of the Commissioner to petitioner, and in nowise made a part of petitioner's said appeal, and being wholly different in nature and in the facts out of which they arise from that set forth in said sixty-day letter.

Whether or not entries in books of account of said partnership and the oral testimony of competent witnesses introduced at the hearing of said appeal by the petitioner, were sufficient, as a matter of law, to establish the value and rates of depreciation of tangible properties of said partnership for the obsolescence of which a deduction was claimed, in the absence of any offer of evidence or proof to the contrary by the Commissioner.

Whether or not the Commissioner validly and effectively asserted at or before the hearing of said appeal a claim for deficiency other or greater than or in addition to alleged deficiency set forth in said sixty-day letter.

Whether or not obsolescence of goodwill occasioned by prohibition legislation constituted an allowable deduction.

Whether or not obsolescence of tangible assets occasioned by prohibition legislation constituted an allowable deduction, and if so, whether or not said partnership was entitled to apportion the loss resulting from said obsolescence over a period beginning with the time when it first learned that it would be obliged to discontinue its business and ending with the time when said business was actually terminated by reason of said prohibition legislation.

Whether or not petitioner was entitled to a continuance of said hearing of said appeal.

The foregoing questions were decided by said United States Board of Tax Appeals adversely to petitioner, and the position [34] of petitioner with respect thereto is covered by the assignments of error hereinafter set forth.

II.

DESIGNATION OF COURT OF REVIEW.

Petitioner is and was at all times herein mentioned an inhabitant of the State of Cailifornia, residing in the City of San Francisco in said state, and being aggrieved by the said decision, findings of fact, opinion and order of redetermination of said Board, desires that the same be reviewed in accordance with law by the United States Circuit Court of Appeals for the Ninth Circuit.

ASSIGNMENTS OF ERROR.

Petitioner as a basis for review, assigns the following errors which he avers occurred before and

upon the hearing of said cause by the United States Board of Tax Appeals and in the decision, findings of fact and opinion of said Board therein, and in the order of redetermination rendered, given and made in said cause, and upon which errors he relies to reverse said decision and order of redetermination, to wit:

(1) The said Board erred in rendering its decision for Respondent herein.

(2) The said Board erred in determining that there is a deficiency in the taxes of petitioner for the year 1918 in the amount of $2,146.41, for the year 1919 in the amount of $7,275.23, and for the year 1920 in the amount of $211.66, or in any amount or amounts at all or any deficiency at all.

[35] (3) The said Board erred in allowing respondent's amended answer herein to be filed without previous notice being given to the petitioner herein and in granting respondent's motion for the filing of said amended answer without previous notice to petitioner of said motion or a hearing thereof.

(4) The said Board erred in refusing to strike the amended answer of respondent herein upon motion duly made by petitioner at the hearing of said cause and in denying said motion.

(5) The said Board erred in refusing to grant to petitioner and in denying his motion for a continuance of the hearing of said appeal.

(6) The said Board erred in refusing, upon motion duly made therefor by petitioner at the hearing of said cause, to strike from respondent's

amended answer an allegation in Paragraph 4a thereof which reads as follows: "alleges that the Commissioner erred by not including in petitioner's income for the year 1918, $5,709.70, for the year 1919, $11,419.39, and for the year 1920, $475.80, said amounts being the petitioner's distributive interest in $52,814.70 deducted for the taxable years 1918, 1919 and 1920 by Schlesinger & Bender as obsolenscence of goodwill." The Board erred in denying said motion.

(7) The said Board erred in refusing upon motion duly made therefor by petitioner at the hearing of said cause, to strike from respondent's amended answer an allegation in Paragraph 5c which reads as follows: "and alleges that the obsolescence [36] of goodwill amounting to $52,814.70 deducted by Schlesinger & Bender as alleged in subdivision C of paragraph 5 of the petition is not an allowable deduction of said copartnership." The Board erred in denying said motion.

(8) The said Board erred in holding that the so-called affirmative allegations contained in respondent's amended answer were properly included and might remain therein.

(9) The said Board erred in considering obsolescence of goodwill as an issue in said appeal and in ruling that it was an isssue therein and in holding that obsolescence of goodwill was made an issue of and in said appeal by the pleadings therein.

(10) The said Board erred in its failure to find or hold that petitioner was entitled to claim deduction for loss occasioned by obsolescence of

the furniture, equipment and leasehold improvements of the partnership of Schlesinger & Bender, of which he was a member, and to apportion this loss over the period of eighteen and one-half months beginning with 1918 when the partnership first learned that it would be obliged to terminate the business, and ending in 1920 when the business was terminated by reason of prohibition legislation.

(11) The said Board erred in its failure to find that improvements on the leasehold of the partnership of Schlesinger & Bender had a value of $7,200.00, and that said value was entirely wiped out by complete obsolescence of said improvements upon the termination of the lease.

(12) The said Board erred in its failure to find that [37] the value of tangible assests (exculsive of leasehold improvements) of the partnership of Schlesinger & Bender for which obsolescence was claimed was $13,965.03, and that as a result of said obsolescence the value was reduced to a junk value of $7,801.18.

(13) The said Board erred in finding that no entries were made on the books of the partnership of Schlesinger & Bender of the sale in 1920 of its furniture and equipment. Said finding is wholly unsupported by and contrary to the evidence.

(14) The said Board erred in its failure to find that the proceeds received by the partnership of Schlesinger & Bender in 1920 from the sales of cooperage, scrap and office furniture was the sum of $7,801.18, said cooperage, scrap and office fur-

niture being part of the property for which a deduction for obsolescence was claimed.

(15) The said Board erred in its failure to find that the partnership of Schlesinger & Bender discontinued on or about January 16th, 1920, the use of its leasehold premises.

(16) The said Board erred in its failure to find that deduction for obsolescence of goodwill in the amount of $52,814.70 was in fact allowed to copartnership of Schlesinger & Bender by the Commissioner of Internal Revenue.

(17) The said Board erred in finding that a motion was duly granted by the Board for the filing of an amended answer in this proceeding. Said finding is wholly unsupported by and contrary to the evidence.

(18) The said Board erred in finding that at the hearing [38] of this cause Commissioner contended for an increase of deficiencies based upon the alleged affirmative allegations in the amended answer with respect to the deduction for obsolescence of goodwill. Said finding is wholly unsupported by and contrary to the evidence.

(19) The said Board erred in holding that any waiver executed by petitioner for the year 1918 was valid and/or effectively extended the time fixed by law within which assessment could be made for that year.

(20) The said Board erred in holding that any waiver executed by petitioner for the year 1919 was valid and/or effectively extended the time fixed

by law within which assessment could be made for that year.

(21) The said Board erred in failing to hold that an undated waiver bearing the purported signature of petitioner covering 1918, but bearing no stamp of approval earlier than October 7th, 1924, was not effective to bar the assessment and/or collection of taxes the statutory period of which assessment and/or collection could be made having expired March 15, 1924.

(22) The said Board erred in failing to hold that a waiver bearing purported signature of petitioner for 1918 dated February 3, 1925, expiring December 31, 1925, and bearing no stamp of approval earlier than March 25, 1925, was invalid and void and did not extend the period fixed by law; the statutory period having expired March 15, 1924.

(23) The said Board erred in failing to hold that a [39] waiver bearing the purported signature of petitioner for the year 1919 dated February 3, 1925, and expiring December 31, 1925 and bearing no stamp of approval earlier then March 25, 1925, was invalid and void and did not extend the period fixed by law, the statutory period having expired March 15, 1925.

(24) The said Board erred in failing to hold that even if the allegations contained in the amended answer filed on April 8, 1927, had constituted a valid assertion of a claim for additional deficiency, that claim for such additional deficiency was nevertheless forever barred by reason of the expiration period thereto of the statutory period of limitations.

(25) The said Board erred in holding that a consent or waiver executed after statutory period of limitations has expired is valid and that taxes may be assessed within the period of such consent or waiver.

(26) The said Board erred in holding that a consent or waiver is valid and that taxes may be assessed within the period of such consent or waiver notwithstanding the fact that such waiver or consent has not been approved by the Commissioner until after the expiration of the statutory period of limitations.

(27) The said Board erred in denying the contention of petitioner with respect to the issue of the statute of limitations.

(28) The said Board erred in holding that the evidence was insufficient as to the value of the tangible assets on account of which obsolescence was claimed.

[40] (29) The said Board erred in holding that there was not sufficient evidence to establish how the book values of the tangible assets for which deduction for obsolescence was claimed were computed, and in holding that the method of computing said book values was necessary to be proved.

(30) The said Board erred in holding that there was no proof of costs or appropriate rates of depreciation of the tangible assets for which deduction for obsolescence was claimed.

(31) The said Board erred in its failure to hold that the amount sold or salvaged from the furni-

ture and equipment of Schlesinger & Bender in 1920 was $7,801.18.

(32) The said Board erred in finding and holding that it had no basis upon which to determine the amount of obsolescence either of furniture and equipment and/or leasehold improvements, and in denying petitioner's contention upon that issue. Said finding is wholly unsupported by and contrary to the evidence.

(33) The said Board erred in holding that petitioner was not entitled to deduct and could not deduct anything for obsolescence of tangible assets of said partnership of Schlesinger & Bender.

(34) The said Board erred in holding that the Commissioner had erred in allowing the partnership of Schlesinger & Bender a deduction for obsolescence of goodwill.

(35) The said Board erred in holding that the Commissioner did at or before the hearing of said cause effectively or at all assert a claim for an increased deficiency or for a [41] deficiency in excess of the amount originally determined by him.

(36) The said Board erred in holding that by so-called affirmative allegations in his amended answer or otherwise or at all Commissioner had effectively asserted a claim for an increased deficiency within the meaning of section 274E of the Internal Revenue Act of 1926, or otherwise or at all.

(37) The said Board erred in finding and holding that the following statements in the amended answer constituted affirmative allegations, to wit: "that the Commissioner erred in not including in

the petitioner's income for the year 1918, $5,709.70, and for the year 1919, $11,419.39, and for the year 1920, $475.80, said amounts being the petitioner's distributive interest in $52,814.70 deducted for the taxable years 1918, 1919 and 1920, for obsolescence of goodwill," and "that the obsolescence of goodwill amounting to $52,814.70 * * * is not an allowable deduction to said copartnership."

(38) The said Board erred in failing to hold that the prayer in said amended answer completely negatived the construction of said amended answer as an assertion of a claim for affirmative relief.

(39) The said Board erred in holding that obsolescence of goodwill is not an allowable deduction from gross income.

(40) The said Board erred in holding that a sufficient claim for additional deficiency or addition in tax is made if the Commissioner affirmatively alleges error in his original determination together with facts sufficient, if proved, to result in an increase of the net income and the tax of the petitioner over that originally determined by him.

[42] (41) The said Board erred in assuming jurisdiction over and in considering and determining as issues matters and items not mentioned in or made subject matter of the Commissioner's letter to petitioner and not otherwise effectively asserted at or before the hearing.

(42) The said Board erred as follows: Said Board failed and refused to allow any deduction for obsolescence of furniture and equipment of the copartnership of Schlesinger & Bender and to allow

a re-apportionment of this deduction over the years 1918, 1919 and 1920; and notwithstanding this fact said Board failed to allow any credit to petitioner for his distributive share of the tax paid for 1920 upon $7,801.18, reported as a profit by the copartnership of Schlesinger & Bender in the year 1920, and representing the amount received as salvage by said copartnership of said furniture and equipment.

(43) The said Board erred in overruling the objection of counsel for petitioner to the question put to LeRoy Schlesinger and set forth on pages 58 and 59 of the transcript of the proceeding upon said appeal, and reading as follows:

> "Q. And did they ever claim a deduction for the obsolescence of goodwill for prohibition purposes in those returns?
>
> Mr. BAYER.—I should like, at this time, to interpose an objection to all questions, relating to obsolescence of goodwill, and to save time, I ask that that same objection be preserved with respect to all questions with reference thereto.
>
> Mr. VAN FOSSAN, Member.—The objection is overruled."

[43] 44. The said Board erred in making an order of redetermination and/or decision pursuant to the Board's findings of fact and opinion promulgated September 25, 1928.

(45) The said Board erred in ordering and deciding that there is any deficiency, tax or sums of money due, collectible and/or assessable from or against the above-entitled petitioner for the years 1918, 1919 and 1920.

(46) The said Board erred in that its decision rendered in said appeal is contrary to and against law.

(47) The said Board erred in ordering the entry of judgment under Rule 50 pursuant to the prevailing opinion of the Board rendered in said appeal.

WHEREFORE, the above-mentioned petitioner herein prays that the United States Circuit Court of Appeals for the Ninth Circuit review the action of the said United States Board of Tax Appeals in this cause and reverse said decision and order of redetermination of said Board, and direct and order the making and entry of a decision and order by said Board in favor of the petitioner determining that there is no deficiency or increased deficiency in income taxes due, collectible and/or assessable from the petitioner for the years 1918, 1919 and 1920, and that there is no tax or amount at all due, collectible and/or assessable from or against said petitioner for 1918, 1919 and 1920, and that the Clerk of said Board be directed to transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit certified copies of each and all of the documents necessary and [44] material to the presentation and consideration of the foregoing petition for review and as required by the rules of said court and by law, and for such other and further relief as may to this Court appear proper in the premises.

And your petitioner will ever pray.

LEON L. MOISE,
Petitoner and Appellant.
JEROME H. BAYER,
_____,
Attorneys for Petitioner and Appellant,
1225 Crocker First National Bank Building,
San Francisco, California.

[45] State of California,
City and County of San Francisco,—ss.

Leon L. Moise, being first duly sworn, on oath deposes and says:

That he is the petitioner and appellant above named; that he has read the foregoing petition; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true; and that the said petition is filed in good faith.

LEON L. MOISE.

Subscribed and sworn to before me this 29th day of May, 1929.

[Seal] LAURA E. HUGHES,
Notary Public, in and for the City and County of San Francisco, State of California.

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[46] United States Board of Tax Appeals. Filed Jun. 13, 1929.

United States Board of Tax Appeals.

DOCKET No. 7453.

LEON L. MOISE,

Petitioner and Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent and Appellee.

NOTICE.

To Hon C. M. Charest, General Counsel, Bureau of Internal Revenue, Washington, D. C.

You are hereby notified that the above-named petitioner this 11 day of June, 1929, filed with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision, findings of fact, opinion, and order of redetermination of said Board in the above-entitled matter. A copy of said petition for review and assignments of error as filed is attached hereto.

JEROME H. BAYER,

_____,

Attorneys for Petitioner and Appellant,
1225 Crocker First National Bank Bldg.,
San Francisco, California.

I hereby this 8 day of June, 1929, accept personal service of a copy of the petition to review and

assignments of error in the above-entitled matter together with notice of the filing thereof.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue, for Respondent and Appellee.

Now, March 1, 1930, the foregoing petition for review with proof of service certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[47] Lodged 2–12–30.

Filed Feb. 15, 1930. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 7453.

LEON L. MOISE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STATEMENT OF EVIDENCE.

The above-entitled appeal, having been consolidated by order of the Board of Tax Appeals with the appeals of Gerald F. Schlesinger, Docket No. 7454, and LeRoy Schlesinger, Docket Nos. 7455 and 8036, for hearing and decision, came on regularly for hearing before United States Board of [48]

Tax Appeals, Honorable Ernest H. Van Fossan, Member, Presiding, on Wednesday, May 4, 1927, at 11 o'clock A. M. of said day, in room 402, City Hall, in the City and County of San Francisco, State of California. The petitioners were represented by Jerome H. Bayer, Esq. The Commissioner of Internal Revenue was represented by T. M. Mather, Esq. The respective parties answered "Ready," and thereupon proceedings were commenced. On behalf of the petitioners, Jerome H. Bayer, Esq., as their counsel, made an opening statement. There then followed a discussion between respective counsel and Mr. Van Fossan, Member, after which, Jerome H. Bayer, Esq., on behalf of petitioners, made a motion to have stricken from the amended answer on file in the appeal of Leon L. Moise, Docket No. 7453, certain allegations, to wit: an allegation in Paragraph 4(a) which reads as follows:

> "that the Commissioner erred by not including in the petitioner's income for the year 1918, $5,709.70, for the year 1919, $11,419.39, and for the year 1920, $475.80, said amounts being the petitioner's distributive interest in $52,814.70, deducted for the taxable years 1918, 1919, and 1920, by Schlesinger and Bender an obsolescence of goodwill";

and an allegation in Paragraph 5(c) which reads as follows:

> "that the obsolescence of goodwill amounting to $52,814.70 deducted by Schlesinger and Bender as alleged in subdivision (c) of para-

graph 5 of the petition is not an allowable deduction to said co-partnership";

and a motion to have stricken from the amended answer on file [49] in each of the other of said appeals corresponding allegations therein contained.

The grounds of these motions to strike out said allegations from the amended answers were stated at the hearing by Jerome H. Bayer, Esq., counsel for petitioners, substantially as follows: That these amended answers were served upon petitioners only about two or three weeks prior to the hearing, notwithstanding the fact that these appeals were filed nearly two years previously, and that these amended answers attempt to reopen certain questions which all had deemed entirely settled; that no notice of the motions for leave to file these amended answers was given to the taxpayers until after the motions had been granted; that said motions were granted without any notice to the petitioners of the time or place of the hearing thereof, whereas taxpayers were entitled to fifteen (15) days' notice under the regulations of the Board (Rep. Tr., pp. 7, 8, 10 and 20); that the contents of said allegations of said amended answers are not proper issues in these appeals, since the deficiency letters which are the bases of these appeals and the petitions of appeal in nowise refer to any controversy or issue with respect to deductions made for obsolescence of goodwill; that at a late day, counsel for the Commissioner of Internal Revenue seeks to inject into these appeals matters which were in nowise contemplated in the pleadings or papers [50] upon which the appeals are based;

that under Subdivision (f) of Sec. 274 of the Revenue Act of 1926, the Commissioner has no right to determine a deficiency in addition to that specified in the deficiency letter; that said subdivision must be applied to these appeals; that the issue in these appeals must be confined to the issue as determined by the deficiency letters upon which the taxpayers fairly relied when they filed their appeals; that Subdivision (e) of Sec. 274 of the Revenue Act of 1926 provides that the Board shall have jurisdiction to redetermine the correct amount of deficiency, even if in excess of the amount mentioned in notice to taxpayer, if claim therefor is asserted by the Commissioner at or before the hearing; that the allegations in the amended answers to which motions to strike are directed merely allege defensively that the Commissioner erred in allowing deduction for obsolescence of goodwill and the prayers of the amended answers merely ask that the appeals be denied; that there are in the amended answers no claims asserted for additional deficiency but merely allegations by way of affirmative defense and followed by prayers asking that the appeals be denied; nor is Commissioner here asserting any claim for additional deficiency. (Rep. Tr., pp. 7, 8, 9, 10, 11, 12, 14, 15.)

Then followed argument by respective counsel upon these motions to strike said allegations from the amended [51] answers, at the conclusion of which, the said motions were denied; Mr. Van Fossan, Member, saying, "I believe that we will proceed with the trial of the case on the issues as joined by the amended answers" (Rep. Tr., p. 23).

Thereupon Jerome H. Bayer, Esq., on behalf of petitioners, made a motion for a continuance of the hearing of said appeals, on the ground that the petitioners were being taken by surprise, and were entitled to further time to prepare themselves, owing to the fact that the Commissioner of Internal Revenue was attempting, through the aforementioned affirmative allegations in the amended answers, at the last minute to inject issues into these appeals, which were not raised in the original answers, and that the petitioners had no notice of the motions for leave to file the amended answers, and were not advised of the filing thereof until shortly before the hearing. (Rep. Tr., pp. 23–24.) T. M. Mather, Esq., on behalf of Commissioner of Internal Revenue, then opposed the motion for continuance substantially on the following grounds: That there was no element of surprise in these cases, and that there is no new question of fact developed by the amended answers but merely a question of law. The motion for continuance was thereupon denied. (Rep. Tr., pp. 23, 24, 28, and 29.)

Thereupon Jerome H. Bayer, Esq., on behalf of petitioners, made a motion for leave to make and file an amendment to the petition of appeal in each of the four [52] appeals to set up the statutes of limitations which appear in the several revenue acts with respect to all of the alleged deficiencies set forth in the deficiency letters and in the affirmative allegations of the amended answers.

The following then transpired:

Mr. BAYER.—"The form of amendment which

we desire to have incorporated into the four appeals will read as follows": (the form of amendment then read by Mr. Bayer and filed in each of the four appeals is printed *in haec verba* elsewhere in this transcript).

Mr. MATHER.—"I have no objection to such an amendment."

The said motion was thereupon granted. (Rep. Tr., pp. 29, 30 and 31.)

Thereupon T. M. Mather, Esq., on behalf of Commissioner of Internal Revenue, made an opening statement. At the conclusion of said opening statement T. M. Mather, Esq., on behalf of Commissioner of Internal Revenue, made certain motions which are not material to the present proceeding and are therefore omitted from this statement of evidence.

Thereupon, LeROY SCHLESINGER, produced as a witness on behalf of the petitioner, having been first duly sworn, testified as follows: (Rep. Tr., p. 36 et seq.)

TESTIMONY OF LeROY SCHLESINGER, FOR PETITIONER.

(Direct Examination by Mr. BAYER.)

WITNESS.—I reside in Burlingame, California. I know Leon L. Moise and Gerald Schlesinger. I have been engaged [53] in business with them up to the time we closed the business in January, 1920. The form of business in which I was engaged with them was a corporation up to June 30, 1918; and from

(Testimony of LeRoy Schlesinger.)

July 1, 1918, to January 16, 1920, it was a copartnership. The partnership was dissolved and our business terminated in January, 1920. The nature of the business which I and these other gentlemen maintained was the California wine business, wholesale wine. Our plant was located at 16th and Kansas Streets, San Francisco. Our office was also located there. The position which I occupied in the firm was that of general manager, and as such I had charge of the supervision of the books of accounts of the partnership.

The witness was then interrogated as follows:

Q. "I show you here, Mr. Schlesinger, a certain book of account, purporting to be a ledger of Schlesinger & Bender, the copartnership. Do you recognize that book?" A. "I do."

The WITNESS.—(Continuing.) That is, in fact, the ledger of Schlesinger & Bender. Referring to page 97 of that book, under the heading of "Building," I find there is an item of loss entered there, on December 31, 1918, profit and loss, $7,200. That entry was made under my supervision and upon my instructions. On the same page, page 97, under the heading of furniture and fixtures, I find a loss entered for furniture and fixtures, on December 31, 1918, for $13,965.03. Both of these entries were made pursuant to my instructions [54] by the bookkeeper of the partnership. The circumstances surrounding the making of those entries are as follows: The $7,200 was what we called "a building account." It was customary for us yearly to deduct 10%, but on December 31, 1918, knowing

(Testimony of LeRoy Schlesinger.)

that we would be compelled to retire from business in 1920, we figured that this entire $7,200 remaining on the building account, which was money that we had advanced in building vats and fixtures, and also building a cellar in the building which we had leased, would be a total loss, and therefore, we deemed it advisable to charge this entire account off in 1918. The item under "building" to which I have referred, covers the office that we built in this building on which we had a lease.

Thereupon the following transpired at the hearing:

Mr. BAYER.—"I offer in evidence this ledger and ask that the page 97 referred to be copied out and then the ledger be withdrawn. Is that agreeable to counsel?"

Mr. VAN FOSSAN, Member.—"Subject to examination by counsel for the respondent and the introduction on his part of such other evidence as he may find pertinent, the request will be granted. It will be marked Petitioner's Exhibit No. 1, and leave granted to substitute a copy for the page that may be pertinent."

Thereupon there was introduced in evidence Petitioner's Exhibit No. 1, page 97 of which is substantially in words and figures as follows:

PETITIONER'S EXHIBIT No. 1.

[55] BUILDING.

1916.			1916.		
Jan. 1.	Balance	11,744.35	Dec. 31.	10%	1,174.43
			1917.		
			Dec. 31.	Depreciation	2,569.92
			Dec. 31.	Balance	8,000.00
		11,744.35			11,744.35
1918.					
Jan. 1.	Balance	8,000.00	June 30.	Depreciation	8,000.00
			Dec. 31.	P. & L.	7,200.00

FURNITURE AND FIXTURES.

1916.							
Jan.	1.	Balance	17,954.50	July	25.	R. R. C.	142.50
Oct.	5.	Ft. on Filter	28.20	Dec.	31.	10%	1,820.02
	16.	"	350.00				
1917.				1917.			
Jan.	25.	Desk	39.90	Dec.	31.	Depreciation	2,522.83
Mar.	3.	Typw.	98.75	Dec.	31.	Balance	15,000.00
July	18.	10% adv. on Ford car	40.00				
July	24.	Bal. Ford car	401.75				
Sept.	4.	Typewriter	92.25				
"	20.	Boiler	220.00				
	4.	Boiler	250.00				
			19,485.35				19,485.35

1918.

Jan. 1.	Balance	15,000.00	June 30.	Depreciation	1,551.67
Feb. 20.	Three files	97.70	Dec. 31.	P. & L.	13,965.03
Mar. 19.	Posting deck	90.00			
Apr. 3.	Van Emon Elevator Co.	275.00			
May 7.	Van Emon Elevator Co.	54.00			
		15,516.70			15,516.70

(Testimony of LeRoy Schlesinger.)

[56] Mr. BAYER.—Q. "Mr. Schlesinger, I show you here a certain document, and ask you whether you recognize it?"

A. "I do."

The WITNESS.—That document is a photostatic copy of the original lease covering the premises which we occupied in San Francisco. To the best of my knowledge it is a true and exact copy of the lease which was executed by and between Schlesinger and Bender and H. Levy & Company on the 31st day of December, 1910.

Mr. BAYER.—"I offer that in evidence."

The WITNESS.—(Continuing.) I couldn't tell you the exact date when this photostat was made. It was made under my direction, I believe that it was made in Washington from the original lease. I was not there at that time. It was made at our request. The original lease was sent to the Government and we were never able to find it. And this photostat was made at the request of our accountants. I cannot recollect when we requested this photostat to be made. It is my understanding that the original cannot be located by the Government. As to what they made the photostat from, I had a copy of it, myself; I had made a typewritten copy of the original before I sent the original to the Government. To the best of my knowledge this photostatic copy was made in Washington.

Mr. BAYER.—"We offer this in evidence."

Mr. MATHER.—"That is objected to as incompetent and not the best evidence."

(Testimony of LeRoy Schlesinger.)

Mr. VAN FOSSAN, Member.—"It will be admitted as Petitioners' Exhibit No. 2."

[57] Thereupon there was introduced in evidence Petitioner's Exhibit No. 2, the material portions of which are substantially in words and figures as follows:

PETITIONER'S EXHIBIT No. 2.

"THIS INDENTURE, Made at San Francisco, California, this 31st day of December, A. D. 1910, by and between H. LEVI & COMPANY, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of California, hereinafter called the Lessor, which expression shall include its successors and assigns, and SCHLESINGER & BENDER, INC., a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of California, hereinafter called the Lessee, which expression shall include its successors and assigns,

WITNESSETH:

"That Whereas, the said lessor is the owner of a triangular lot of land situated in the City and County of San Francisco, State of California, and briefly described as follows, to-wit:

"Beginning at the point where the Northerly line of Sixteenth Street intersects the Easterly line of Kansas Street; thence running Easterly along the Northerly line of Sixteenth Street One hundred and eighty-one and forty-six one hundredths (181.46) feet; thence at an angle Northwesterly Three hun-

dred and fifty-six and twenty-two one hundredths (356.22) feet to a point in the Easterly line of Kansas Street which is distant thereon Ninety-three and forty-six one hundredths (93.46) feet southerly from the Southerly line of Fifteenth Street; thence running Southerly along said Easterly line of Kansas Street three hundred and six and fifty-four one hundredths (306.54) feet to the point of beginning. Containing 27,812 square feet of superficial area.

"And in consideration of the agreement of the lessee herein expressed said lessor is willing to construct thereon a two-story Class C brick warehouse building with division firewall as required by the Municipal Ordinance, the same to cover about 20,000 square feet of said area of said lot, and,

"Whereas, said lessee desires to lease said lot and building for the purpose of conducting therein and thereon its business as a wine merchant,

"Now Therefore, said lessor does by these presents lease and demise unto the said lessee the aforesaid real property, together with said building when the same shall be constructed thereon;

[58] "To have and to hold the same and said premises hereby demised for the term of Fifteen (15) years from the date said building shall be completed and ready for occupation and possession thereof is offered to said lessee, yielding and paying therefor unto said lessor a monthly rental which shall be ascertained at the time of completion of said building in the manner hereinbelow provided, and shall be payable monthly in advance in gold coin of the United States of America of present standard

value, at the office of said lessor or at such other place in San Francisco as it may appoint.

* * * * * * * * * * *

"Said building shall be provided with one suitable freight elevator, and the rough plumbing and electric wiring shall be put in by the lessor at its expense, but all interior subdivisions, office conveniences and accessories and all fixtures for light, water and power shall be put in by the lessee at its own expense. The lessee may also at any time build upon the unoccupied portion of said lot at its own expense, provided, however, that the plans and specifications of the building to be erected shall first be submitted to and approved by the lessor and that the lessee shall for the remainder of said term pay any increased in the rates of insurance on said building constructed by the lessor which may be caused by or due to the erection of said new building or structure by the lessee.

* * * * * * * * * * *

"That the lessee will not make nor suffer to be made any alterations of or addition to said premises without the consent in writing of the lessor, its successors or assigns, first had and obtained, except as hereinabove provided, and that all additions to or improvements of the said premises and all new buildings or structures constructed or placed upon said lot by the lessee or by its authority shall belong to the lessor, its successors or assigns.

* * * * * * * * * * *

"The lessee shall during the term of this lease keep said premises free from nuisance and offense

(Testimony of LeRoy Schlesinger.)

to health and safety and that it will in all respects in all its dealings with said property comply with all laws and ordinances relating thereto and with the requirements of the police, fire department, board of supervisors, and board of public works, of the City and County of San Francisco, in reference thereto, at its own expense, and will not conduct nor permit to be conducted thereon any other business than its own business as aforesaid, nor any transaction that will damage the building or cause an increase of the rates of insurance.

* * * * * * * * * * *

[59] "IN WITNESS WHEREOF, the Lessor and Lessee have hereunto caused their corporate names to be subscribed and their corporate seals to be affixed by their proper officers thereunto duly authorized by Resolution of their respective boards of directors, the day and year first above written.

"H. LEVI & COMPANY, (Lessor).

"By H. LEVI, President.

"By R. C. FEIGE, Secretary.

"SCHLESINGER & BENDER INC.

"By LEON L. MOISE, President.

"By L. SCHLESINGER, Secretary."

The WITNESS.—(Continuing.) Subsequent to 1918, we entered into negotiations with Levy & Sons, the owners of these leased premises, to terminate the lease; I wrote them a letter. I am shown what purports to be a copy of a letter sent to H. Levy & Co., and signed Schlesinger & Bender, per L. S. I identify that document. It is a letter that I wrote,

(Testimony of LeRoy Schlesinger.)

notifying them that we were going to cancel the lease, and after they received the letter, they came down. I delivered the lease to them and the lease was terminated. To the best of my recollection, the premises were vacated about the 15th of April, or the 1st of May, or thereabouts. But the premises were not used for our business after January 16, 1920.

Mr. BAYER.—We offer this in evidence.

Mr. VAN FOSSAN, Member.—It will be received as Petitioner's Exhibit No. 3.

Thereupon there was introduced in evidence Petitioner's Exhibit No. 3, which is substantially in words and figures as follows:

[60] PETITIONER'S EXHIBIT No. 3.

SCHLESINGER & BENDER, Inc.

San Francisco, Cal. 3/22/1920.

H. Levi & Co.,

City.

Dear Sirs:

We refer you to portions of the lease which read as follows: Whereas: said lessee desires to lease said lot and building for the purpose of conducting therein and thereon its business as a wine merchant.

Paragraph 6: And will not conduct nor permit to be conducted thereon any other business than its own business as aforesaid nor any transaction that will damage the building or cause an increase of the rates of insurance.

(Testimony of LeRoy Schlesinger.)

Being that the government has so legislated that we can no longer conduct our own business which was a wine business, we hereby beg to notify you that we will vacate these premises on March 30th 1920.

Respectfully yours,
SCHLESINGER & BENDER,
per: L. S."

The WITNESS.—(Continuing.) I have received a form of assessment for taxes covering the year 1918. The date of that assessment was February 27, 1925.

The witness was thereupon cross-examined by T. M. MATHER, Esq., and upon such cross-examination testified as follows:

The WITNESS.—"My name is Leroy Schlesinger."

Mr. BAYER.—"May I ask one more question: Mr. Schlesinger, when you retired from business in 1920, was any sale made of the furniture and equipment of your business?"

A. "There was."

The WITNESS.—(Continuing.) The entry of what it was sold for was only made in a small little pass-book covering the amount that we received and was rebated in our income tax [61] of 1920. A tax was paid, not as our income tax. The report in 1920 will show.

The following then transpired at the hearing:

Mr. MATHER.—(Showing the witness a docu-

(Testimony of LeRoy Schlesinger.)

ment.) Q. "Mr. Schlesinger, is that your signature?"

A. "That is my signature."

Q. (Showing the witness another document:) "Is that your signature?"

A. "Yes, that is my signature."

Mr. VAN FOSSAN, Member.—"Counsel is showing him what?"

Mr. MATHER.—"Income surtax waiver."

Mr. VAN FOSSAN, Member.—"You first showed him the income tax return?"

Mr. MATHER.—"The income tax return for the year 1918."

Mr. MATHER.—"I would like to have that marked for identification as Respondent's Exhibit 'A.'" (Rep. Tr., pp. 46, 47.)

Redirect examination of the witness was thereupon conducted by JEROME H. BAYER, Esq.

Mr. BAYER.—Q. "Mr. Schlesinger, I show you this document, which is headed 'Individual Income Tax Return for the calendar year 1918' and ask you whether that is your signature?"

A. "It is."

Mr. BAYER.—"I offer that in evidence as petitioner's exhibit. I am offering the whole thing."

[62] Mr. VAN FOSSAN, Member.—"It will be received as Petitioner's Exhibit No. 4." (Rep. Tr., pp. 47, 48.)

(NOTE: Petitioner's Exhibit No. 4 is "Individual Income Tax Return for Calendar Year 1918," of Le Roy Schlesinger, and it shows upon its face

(Testimony of Leon L. Moise.)
that it was filed with the Collector of Internal Revenue in the 1st District of California not later than March 15th, 1919.)

Thereupon LEON L. MOISE was produced as a witness on behalf of petitioner, and having been first duly sworn, testified as follows:

TESTIMONY OF LEON L. MOISE, FOR PETITIONER.

(Direct Examination by Mr. BAYER.)

The WITNESS.—I am the Leon L. Moise named in the petition now pending before this court. I reside at 380 First Avenue, San Francisco. That is my signature on the document now shown me entitled "Income and Profits Tax Waiver, dated February 3, 1925." That is for 1918. I do not recognize as my signature the signature on the document which is shown me entitled "Income and Surtax Waiver." I never authorized anybody to sign that for me. I do not know who did sign this waiver, which I have stated is not my signature. I do not recognize that handwriting as belonging to anyone within my acquaintance. I never signed any other waivers for the year 1918, save and except the one which I have already identified, dated February 3, 1925.

Mr. BAYER.—"I desire to offer in evidence, on behalf of the petitioners, the income and profits tax waiver, dated [63] February 3, 1925, and the following document which the witness has testified

(Testimony of Leon L. Moise.)

does not bear his signature, but which is entitled 'Income and Surtax Waiver,' in evidence."

Mr. VAN FOSSAN, Member.—They will be received as Petitioner's Exhibits Nos. 5 and 6.

(NOTE: True and exact copies of the documents admitted in evidence as Petitioner's Exhibits Nos. 5 and 6 are attached to this Statement of Evidence at the end thereof, and marked Exhibits No. 1 and No. 2.)

The WITNESS.—(Continuing.) I have heard Le Roy Schlesinger testify as to certain deductions which were made for the year 1918 upon his return for obsolescence of the tangible assets of the business. Similar deductions were made in my return for that year. (Rep. Tr., pp. 48–50.)

Thereupon cross-examination of the witness was conducted by T. M. MATHER, Esq.

The WITNESS testified as follows: The signature on the Income and Surtax Waiver for the year 1918, Petitioner's Exhibit No. 6, is not my signature. To the best of my knowledge I did not authorize anyone to make that waiver for me. It might be possible that I might have authorized somebody to execute that waiver for me, because it is a long time since that happened. I do not think I authorized anybody to sign for me. I never do authorize anybody to sign [64] for me. I authorized no one to sign that waiver for me. To the best of my knowledge these two are the only waivers I ever executed.

(Testimony of Leon L. Moise.)

(The witness was referring to two documents exhibited to him, to wit: "Income and Profits Tax Waiver for 1918," dated February 3, 1925, being Petitioner's Exhibit No. 5, and "Income and Profits Tax Waiver for 1919," dated February 3, 1925, being Respondent's Exhibit "B.")

Q. Is it possible that you may have executed some other waivers?

A. To the best of my knowledge I do not remember that I executed other waivers. It is possible. That is my signature on Income and Profits Tax Waiver, dated February 3, 1925, covering the taxable year 1919. I executed that instrument, on or about the date it bears date.

Mr. MATHER.—I would like to have that marked for identification, Respondent's Exhibit No. "B." (Rep. Tr., pp. 51, 52.)

Thereupon GERALD F. SCHLESINGER was produced as a witness on behalf of the petitioner, and having been first duly sworn, testified as follows:

TESTIMONY OF GERALD F. SCHLESINGER, FOR PETITIONER.

(Direct Examination by Mr. BAYER.)

The WITNESS.—I am the Gerald F. Schlesinger named in one of these appeals. I have heard the testimony of LeRoy Schlesinger as to certain deductions which he made in his [65] income tax return for the year 1918, relative to obsolescence

(Testimony of Gerald F. Schlesinger.)

of tangible assets. A similar deduction was made in my return for that year. (Rep. Tr., p. 53.)

Thereupon the witness was cross-examined by T. M. MATHER, Esq., and the following transpired:

Q. Did you ever execute any waivers, Mr. Schlesinger? A. I did. (Rep. Tr., p. 53.)

Thereupon GERALD F. SCHLESINGER was recalled by the petitioner, and testified as follows:

TESTIMONY OF GERALD F. SCHLESINGER, FOR PETITIONER (RECALLED).

(Direct Examination by Mr. BAYER.)

The WITNESS.—The signature on the document here shown to me entitled Income and Profits Tax Waiver, bearing date January 30, 1925, is mine.

Mr. BAYER.—We ask that that document be entered in evidence.

Mr. VAN FOSSAN, Member.—It will be received as Petitioner's Exhibit No. 7.

(NOTE: A true and correct copy of the document received in evidence as Petitioner's Exhibit No. 7 is attached to this Statement of Evidence at the end thereof and marked Exhibit No. 3.)

The WITNESS.—The signature on the document here shown to me entitled "Income and Profits Tax Waiver," bearing date January 30, 1925, is my signature. The signature on [66] the document here shown to me entitled "Income and Surtax Waiver" is not my signature. (The witness was

(Testimony of Gerald F. Schlesinger.)

last referring to a document admitted in evidence as Petitioner's Exhibit No. 9.)

Mr. BAYER.—I offer the last two documents in evidence.

Mr. VAN FOSSAN, Member.—They will be received as Petitioner's Exhibits 8 and 9.

(NOTE: True and correct copies of the two documents admitted in evidence as Petitioners' Exhibits Nos. 8 and 9 are attached to this Statement of Evidence at the end thereof, and marked Exhibits No. 4 and No. 5.)

The witness was thereupon cross-examined by T. M. MATHER, Esq., and testified as follows:

The WITNESS.—I cannot recall that I ever before saw the document, Petitioners' Exhibit No. 9. I am positive that that is not my signature. I do not know J. V. Brown. I never heard of him. (Rep. Tr., pp. 56, 57.)

Thereupon petitioners rested.

Thereupon LeROY SCHLESINGER was recalled by the Commissioner as an adverse witness and testified as follows:

TESTIMONY OF LEROY SCHLESINGER, FOR PETITIONER (RECALLED).

(Direct Examination by Mr. MATHER.)

The WITNESS.—I was a member of the firm of Schlesinger & Bender. The other partners of that firm were Leon L. Moise [67] and Gerald F. Schlesinger. We had articles of copartnership of

(Testimony of LeRoy Schlesinger.)

that firm. I have not them here in court. They certainly were written articles of copartnership, to the best of my knowledge. The partner's interest in this partnership was one-third each, and the members were Gerald F. Schlesinger, myself and Leon L. Moise. Our partnership executed income tax returns while they were in business. The years for which the partnership executed Income Tax Returns were July 1, 1918, to December 31, 1918, for the whole year of 1919 and 1920.

Mr. MATHER then interrogated the witness as follows: And did they ever claim a deduction for the obsolescence of goodwill for prohibition purposes in those returns?

Mr. BAYER.—I should like, at this time, to interpose an objection to all questions, relating to obsolescence of goodwill, and to save time, I ask that the same objection be preserved with respect to all questions with reference thereto.

Mr. VAN FOSSAN, Member.—The objection is overruled.

A. I believe they did.

The WITNESS.—(Continuing.) I do not recall the amount of the allowance of obsolescence of goodwill for prohibition purposes by the Government. The department allowed the partnership a deduction for the obsolescence of goodwill for prohibition purposes. (Rep. Tr., pp. 57–60.)

[68] Mr. MATHER then stated: At this time the Commissioner wishes to introduce in evidence Respondent's Exhibit "A," which is an Income and

Surtax Waiver for the year 1918, signed by LeRoy Schlesinger, which has been previously identified.

Mr. VAN FOSSAN, Member.—It will be received as Respondent's Exhibit "A." (Rep. Tr., p. 61.)

(NOTE: A true and correct copy of the document admitted in evidence as Respondent's Exhibit "A," is attached to this Statement of Evidence at the end thereof, and marked Exhibit No. 6.)

Mr. MATHER.—And I also wish to offer in evidence the Income and Profits Tax Waiver, dated February 3, 1925, for the year 1919, signed Leon L. Moise, and marked for identification, Respondent's Exhibit "B."

Mr. VAN FOSSAN, Member.—It will be received as Respondent's Exhibit "B."

(NOTE: A true and correct copy of the document admitted in evidence as Respondent's Exhibit "B" is attached to this Statement of Evidence at the end thereof, and marked Exhibit No. 7.)

Mr. BAYER.—I would like to introduce in evidence the tax returns of the petitioners.

Mr. BAYER.—It is understood that such papers as form a part of the return shall be offered along with the return?

[69] Mr. VAN FOSSAN, Member.—Anything that forms a part of the return as made by the petitioner is included within the word "Return."

Mr. BAYER.—We offer, in accordance with your Honor's ruling, the Individual Tax Return of Gerald F. Schlesinger for the year 1919; the Individual Tax Return of Gerald F. Schlesinger for

the year 1918; the Individual Income Tax Return of Leroy Schlesinger for the year 1920. Subject to your Honor's previous ruling, we offer in evidence, in behalf of petitioners, a document entitled "Individual Income Tax Return for Leon L. Moise, for the year 1918," and Individual Income Tax Return for Leon L. Moise, for the year 1919, and an Individual Income Tax Return for the calendar year 1920 for Leon L. Moise.

Mr. VAN FOSSAN, Member.—It will be marked with appropriate numbers. (Rep. Tr., pp. 62–66.)

(NOTE: Petitioner's Exhibit No. 10 is "Individual Income Tax Return for calendar year 1918," of Gerald F. Schlesinger, and it shows upon its face that it was filed with the Collector of Internal Revenue at Chicago, Illinois, not later than March 22, 1919, and bears stamp "Collector of Internal Revenue, paid March 15, 1919, Cashier A., Chicago, Illinois." It also bears stamp of "Collector of Internal Revenue, March 22, 1919," and is sworn to under date of March 20, 1919.)

Petitioner's Exhibit No. 11 is "Individual Income Tax [70] Return for calendar years 1919," of Gerald F. Schlesinger, and it shows upon its face that it was filed with the Collector of Internal Revenue in the First District of California on March 15, 1920.

Petitioner's Exhibit No. 12, is "Individual Income Tax Return for calendar year 1920," of LeRoy Schlesinger. This return discloses under item 15, page one, entitled "Income from Partner-

ships, etc.," that the taxpayer received the sum of $12,248.96 from the partnership of Schlesinger & Bender for the year 1920 in addition to any sum received as salary from said partnership, and paid tax thereon, and that said return was filed with the Collector of Internal Revenue for the First District of California April 6, 1921.

Petitioner's Exhibit No. 13 is "Individual Income Tax Return for the calendar year 1918," of Leon L. Moise, and shows on its face that it was filed with the Collector of Internal Revenue in the First District of California on March 15, 1919.

Petitioner's Exhibit No. 14 is "Individual Income Tax Return for the calendar year 1919" of Leon L. Moise, and shows on its face that it was filed with the Collector of Internal Revenue for the First District of California on March 15, 1920.

Petitioner's Exhibit No. 15 is "Individual Income Tax Return for calendar year 1920," of Leon L. Moise. This return discloses under item 15, page one, entitled "Income from Partnerships, etc.," that the taxpayers received the sum of $12,248.96, from the partnership of Schlesinger and Bender for the year 1920 in addition to any sum received as salary from said partnership, [71] and paid a tax thereon, and that said return was filed with the Collector of Internal Revenue for the First District of California on April 7, 1921.

Mr. MATHER.—If your Honor please, it is hereby stipulated and agreed, by and between the parties, through their respective counsel, that a letter from A. Lewis, dated October 22, 1924, addressed

to Schlesinger & Bender, contains the correct amount of $52,814.70, that was allowed the partnership of Schlesinger & Bender as obsolescence of goodwill for prohibition purposes, and was distributed over the three years, 1918, 1919 and 1920, as shown in said letter.

Mr. BAYER.—It is so stipulated, and pursuant to that stipulation, that that letter be offered in evidence.

Mr. VAN FOSSAN, Member.—It will be received as Petitioner's Exhibit No. 16.

Thereupon both parties rested.

Mr. VAN FOSSAN, Member.—Let the record show that both parties rest. You can have until July 1st, for filing briefs in this case, briefs to be filed simultaneously, no reply briefs.

(Rep. Tr., pp. 66–68.)

[72] The foregoing is the substance of all the evidence given at the hearing of the above cause before United States Board of Tax Appeals which is material to the petition for review by United States Circuit Court of Appeals for the Ninth Circuit, and the assignments of errors contained in said petition for review.

J. S. Y. IVINS,
Associate Counsel for Petitioner.
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

[73] The foregoing Statement of Evidence is hereby approved and ordered made of record in and for said petition for review and the proceedings thereon, this 15th day of February, 1930.

By the Board.

(S.) LOGAN MORRIS,
Member.

PETITIONER'S EXHIBIT No. 5.

[74] EXHIBIT No. 1 (Front).

U. S. Board of Tax Appeals. Div. ——. Docket 7453, 54, 55, 8036. Admitted in Evidence May 4, 1927. Petitioner's Exhibit 5.

IT:PA:4
GWF:406 February 3, 1925.

INCOME AND PROFITS TAX WAIVER
(For taxable years ended prior to March 1, 1921.)

In pursuance of the provisions of existing Internal Revenue Laws Mr. Leon L. Moise, a taxpayer of San Francisco, Cal., and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year(s) 1918, under existing revenue acts, or under prior revenue acts. This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1925, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days

between the date of mailing of said notice of deficiency and the date of final decision by said Board.

LEON L. MOISE,
Taxpayer.

.....
Date.

Approved Mar. 25, 1925.

D. H. BLAIR,
Commissioner of Internal Revenue.

O. K.—C. C. W.
3/25/25

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

[75] EXHIBIT No. 1 (Back).

[Stamped:]
Received
Feb. 9, 1925.
Personal Audit Division
Personal Audit No. 4
Feb. 9, 1925.
Received

PETITIONER'S EXHIBIT No. 6.

[76] EXHIBIT No. 2 (Front).

U. S. Board of Tax Appeals. Div. ——. Docket 7453, 54, 55, 56. Admitted in Evidence May 4, 1927. Petitioner's Exhibit 6.

[In pencil:]
367
1–Cal
1040

INCOME AND SURTAX WAIVER.

Date

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, LEON L. MOISE of San Francisco, California, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment and collection of the amount of income and surtaxes due under any return made by or on behalf of the said LEON L. MOISE for the year 1918, under the Revenue Act of 1921, or under prior income, excess-profits or war-profits tax acts. This waiver expires March 1, 1925.

LEON L. MOISE,
Taxpayer.

State of California,
City and County of San Francisco,—ss.

On this fourth day of January, in the year One Thousand Nine Hundred and twenty-four, before me, J. D. BROWN, a Notary Public in and for said

City and County, residing therein, duly commissioned and sworn, personally appeared Leon L. Moise, known to me to be the person .... described in, whose name is subscribed to and who executed the annexed instrument and ..he.. acknowledged to me that ..he.. executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the City and County of San Francisco, the day and year last above written.

[Seal] J. D. BROWN,

Notary Public in and for the City and County of San Francisco, State of California.

Rooms 206–7 Humboldt Bank Building

Phone Douglas 2324

My commission expires April 4, 1926.

[77] EXHIBIT No. 2 (Front).

[In pencil:]
367
1–Cal
1040

INCOME AND SURTAX WAIVER.

Date

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, LEON L. MOISE of San Francisco, California, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment and collection of the amount of income and surtaxes due under any return made by or on behalf of the said LEON L.

MOISE for the year 1918, under the Revenue Act of 1921, or under prior income, excess-profits or war-profits tax acts. This waiver expires March 1, 1925.

LEON L. MOISE,
Taxpayer.

By: .....
D. H. BLAIR,
Commissioner.

PETITIONER'S EXHIBIT No. 7.

[78] EXHIBIT No. 3. (Front)

U. S. Board of Tax Appeals. Div. ——. Docket 7453, 54, 55, 8036. Admitted in Evidence May 4, 1927. Petitioner's Exhibit 7.

IT:PA:4.
GWF:406.

San Francisco, Jan. 30, 1925.

INCOME AND PROFITS TAX WAIVER.
(For taxable years ended prior to March 1, 1921.)

In pursuance of the provisions of existing Internal Revenue Laws Mr. Gerald Schlesinger, a taxpayer of 171 Palm Ave., San Francisco, Cal., and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year(s) 1918, under existing revenue acts, or under prior revenue acts. This waiver of the time for making any

assessment as aforesaid shall remain in effect until December 31, 1925, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

GERALD F. SCHLESINGER,
Taxpayer.

.....
Date.

Approved Mar. 25, 1925.

D. H. BLAIR,
Commissioner of Internal Revenue.

O. K.—C. C. W.
3/25/25

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

[79] EXHIBIT No. 3. (Back)

[Stamped:]
Received
Feb. 5, 1925.
Personal Audit Division

PETITIONER'S EXHIBIT No. 8.

[80] EXHIBIT No. 4. (Front)

U. S. Board of Tax Appeals. Div. ——. Docket 7453, 54, 55, 8036. Admitted in Evidence May 4, 1927. Petitioner's Exhibit 8.

San Francisco, Jan. 30, 1925.

IT:PA:4.
GWF:406.

INCOME AND PROFITS TAX WAIVER.
(For taxable years ended prior to March 1, 1921.)

In pursuance of the provisions of existing Internal Revenue Laws Mr. Gerald Schlesinger, a taxpayer of San Francisco, Calif., and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the years(s) 1919, under existing revenue acts, or under prior revenue acts. This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31,

1925, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

GERALD F. SCHLESINGER,
Taxpayer.

.....
Date

Approved Mar. 25, 1925.

D. H. BLAIR,
Commissioner of Internal Revenue.

1918—
1919—

O. K.—C. C. W.
3/25/25

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

[81] EXHIBIT No. 4. (Back)

[Stamped:]
Received
Feb. 5, 1925.
Personal Audit Division

PETITIONER'S EXHIBIT No. 9.

[82] EXHIBIT No. 5. (Front)

U. S. Board of Tax Appeals. Div. ——. Docket ——. Admitted in Evidence May 4, 1927. Petitioner's Exhibit 9.

[In pencil:]
654
1 Ill.
1040
Sep. 25, 1924.

INCOME AND SURTAX WAIVER.

Date

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, GERALD F. SCHLESINGER of San Francisco, California, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment and collection of the amount of income and surtaxes due under any return made by or on behalf of the said GERALD F. SCHLESINGER for the year 1918 under the Revenue Act of 1921, or under prior in-

come, excess-profits or war-profits tax acts. This waiver expires March 1, 1925.

GERALD F. SCHLESINGER,
Taxpayer.
409 E. 50th St.

State of California,
City and County of San Francisco,—ss.

On this fourth day of January in the year One Thousand Nine Hundred and twenty-four, before me, J. D. BROWN, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared Gerald F. Schlesinger, known to me to be the person.. described in, whose name is subscribed to and who executed the annexed instrument and..he..acknowledged to me that..he..executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the City and County of San Francisco, the day and year last above written.

[Seal] J. D. BROWN,
Notary Public in and for the City and County of San Francisco, State of California.
Rooms 206–7 Humboldt Bank Building
Phone Douglas 2324
My commission expires April 4, 1926.

[83] EXHIBIT No. 5. (Front)

[In pencil:]
654
1 Ill.
1040
Sep. 25, 1924.

INCOME AND SURTAX WAIVER.

Date

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, GERALD F. SCHLESINGER of San Francisco, California, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment and collection of the amount of income and surtaxes due under any return made by or on behalf of the said GERALD F. SCHLESINGER for the year 1918 under the Revenue Act of 1921, or under prior income, excess-profits or war-profits tax acts. This waiver expires March 1, 1925.

GERALD F. SCHLESINGER,
Taxpayer.
409 E. 50th St.
Chi., Ill.

By: .....,
.....,
Commissioner.

D. H. BLAIR,
Commissioner.

[84] EXHIBIT No. 5—(Back).

[Stamped:]
Perso
Sep. 30, 1924.
Received

RESPONDENT'S EXHIBIT "A."

[85] EXHIBIT No. 6. (Front)

U. S. Board of Tax Appeals. Div. ——. Docket 7453, 54, 55, 8036. Marked for Identification May 4, 1927. Respondent's Exhibit "A."

[In pencil:]
467
1 Cal.
1040.

22:PA:4.
GWF—406.
Addl. tax $414.99.
M. R.

INCOME AND SURTAX WAIVER.

Date

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, LE ROY SCHLESINGER of San Francisco, California, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment and collec-

tion of the amount of income and surtaxes due under any return made by or on behalf of the said LE ROY SCHLESINGER for the year 1918 under the Revenue Act of 1921, or under prior income, excess-profits or war-profits tax acts. This waiver expires March 1, 1925.

LeROY SCHLESINGER,
Taxpayer.

State of California,
City and County of San Francisco,—ss.

On this fourth day of January, in the year One Thousand Nine Hundred and twenty-four, before me, J. D. BROWN, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared LeRoy Schlesinger, known to me to be the person....described in, whose name is subscribed to and who executed the annexed instrument and..he..acknowledged to me that..he..executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the City and County of San Francisco, the day and year last above written.

[Seal] J. D. BROWN,
Notary Public in and for the City and County of San Francisco, State of California.
Rooms 206–7 Humboldt Bank Building
Phone Douglas 2324
My commission expires April 4, 1926.

[86] EXHIBIT No. 6. (Front)

22:PA:4.
GWF—406.
Addl. tax $414.99.
M. R.

[In pencil:]
467
1 Cal.
1040.

INCOME AND SURTAX WAIVER.

Date

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, LE ROY SCHLESINGER of San Francisco, California, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment and collection of the amount of income and surtaxes due under any return made by or on behalf of the said LE ROY SCHLESINGER for the year 1918 under the Revenue Act of 1921, or under prior income, excess-profits or war-profits tax acts. This waiver expires March 1, 1925.

LeROY SCHLESINGER,
Taxpayer.

By .....,
.....,
Commissioner.

D. H. BLAIR,
Commissioner.

[87] EXHIBIT No. 6. (Back)

[Stamped:]
Personal Audit No. 4.
Sep. 19, 1924.
Received.

RESPONDENT'S EXHIBIT "B."

[88] EXHIBIT No. 7 (Front).

U. S. Board of Tax Appeals. Div.——. Docket 7453, 54, 55, 8036. Admitted in Evidence May 4, 1927. Respondent's Exhibit "B."
IT:PA:4.
GWF:406.

February 3, 1925.

INCOME AND PROFITS TAX WAIVER.
(For taxable years ended prior to March 1, 1921.)

In pursuance of the provisions of existing Internal Revenue Laws Mr. Leon M. Moise, a taxpayer of San Francisco, Cal., and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year(s) 1919 under existing revenue acts, or under prior revenue acts. This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1925, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before

said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

LEON L. MOISE,
Taxpayer.

.....
Date

Approved March 25, 1925.

D. H. BLAIR,
Commissioner of Internal Revenue.

O. K.—C. C. W.
3/25/25.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

[89] EXHIBIT No. 7. (Back)

[Stamped:]
Received
Feb. 9, 1925
Personal Audit Division
Personal Audit No. 4
Feb. 9, 1925
Received

Now, March 1, 1930, the foregoing Statement of Evidence and Exhibits certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[90] Filed Feb. 12, 1930. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 7453.

LEON L. MOISE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of United States Board of Tax Appeals:

You will please prepare and before the tenth day of February, 1930, transmit and deliver to, and file with, the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit copies duly certified of the following documents:

1. The docket entries of all proceedings before United States Board of Tax Appeals in the above-entitled cause;

2. All pleadings before the Board of Tax Appeals, including any exhibits attached thereto;

3. Order for consolidation of appeals designated Docket Nos. 7453, 7454, 7455 and 8036;

4. The findings of fact, opinion and decision of said Board promulgated in said cause on September 25, 1928;

5. The order of redetermination by said Board in said cause;

6. Order dated June 17, 1929, *in re* filing of amended petitions or amendments to petitions;

[91] 7. The petition for review to United States Circuit Court of Appeals for the Ninth Circuit with notice of filing showing service on counsel for the respondent;

8. All orders enlarging time for preparation of the evidence and certification of the record to the Circuit Court of Appeals for the Ninth Circuit;

9. Statement of the evidence;

10. This praecipe for the record.

The foregoing to be prepared, certified and transmitted as required by law and the Rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated —— day of ————, 1930.

J. S. Y. IVINS,
Associate Counsel for Petitioner.

Receipt and due service of a copy of the above and foregoing praecipe is hereby acknowledged this 11th day of February, 1930.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent and Appellee.

Now, March 1, 1930, the foregoing praecipe and proof of service certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Endorsed]: No. 6179. United States Circuit Court of Appeals for the Ninth Circuit. Leon L. Moise, Petitioner, vs. David Burnet, Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed July 1, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States
Circuit Court of Appeals
For the Ninth Circuit.

GERALD F. SCHLESINGER,

Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue,

Respondent.

Transcript of Record.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

No. 6180—INDEX TO TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

[3] Filed Sept. 24, 1925.

United States Board of Tax Appeals.

DOCKET No. 7454.

Appeal of GERALD F. SCHLESINGER, Flood Building, San Francisco, California.

PETITION.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter IT:PA:-4–60D–GWF–406 dated July 29, 1925 and as the basis of his appeal sets forth the following:

1. The taxpayer is an individual with his place of business in the Flood Building, San Francisco, California. He was formerly a member of the copartnership Schlesinger and Bender with its principal office at the same address.
2. The deficiency letter (a copy of which is attached) was mailed to the taxpayer July 29, 1925.
3. The taxes in controversy are income taxes for the calendar years 1918 and 1919 and are less than $10,000.00 to wit $1,021.92 excepting for any adjustment which will be rendered necessary upon the Treasury Department's acceptance of California taxpayers' returns filed on a community property basis.
4. The determination of tax contained in the said deficiency letter is based upon the following error:—

(a) Failure of the Commissioner to allow as a deduction from income in the tax returns filed by Schlesinger and Bender a loss amounting to $13,947.42 sustained in the calendar years 1918, 1919 and 1920 due to the enactment of prohibition legislation thus increasing the *pro rata* share of partnership income taxable to the taxpayer.

5. The facts upon which the taxpayer relies as the basis of his appeal are as follows:

(a) In its tax return for the six months period ending December 31, 1918 the copartnership Schlesinger and Bender claimed as a deduction the sum of $21,848.60 as exhaustion, wear and tear (including obsolescence) of tangible properties. This sum consisted of the following balances:

[4]

Unamortized balance of buildings on leased ground account	$ 7,200.00
Balance of cooperage, furniture and fixtures account	13,965.03
Additional depreciation not charged on books (details not now available)	683.57
Total as above	$21,848.60

(b) In its tax return for the calendar year 1920 the copartnership of Schlesinger and Bender reported as income the sum of $7,801.18 being the total proceeds from sales of cooperage, scrap and office furniture.

(c) The Commissioner in his letter dated Oc-

tober 22, 1924, file IT:PA:4–GWF–406 allowed as a deduction to Schlesinger and Bender obsolescence of goodwill amounting to $52,814.70 apportionable between the years 1918, 1919 and 1920 as follows:—

1918	12/37	$17,129.09
1919	24/37	34,258.19
1920	1/37	1,427.42
As above		$52,814.70

(d) The deduction mentioned in paragraph 5 (a) above as originally claimed by the copartnership was in error and, as in paragraph 4 above, the correct deductible amount is $13,947.42 made up as follows:

Unamortized balance of buildings on leased ground, reverted to lessor January 16, 1920.....			$7,200.00
Cooperage, furniture, fixtures, etc., book value	$13,965.03		
Less:			
Proceeds of sales originally reported as income in the year 1920	$7,801.18		
Estimated value of office furniture retained	100.00	7,901.18	6,063.8
Additional depreciation not charged in books (the details of this item are now available but			

the amount is reasonable because no other depreciation was claimed)	6
Total	$13,9

[5] The above amount should, it is believed, be apportioned in the same manner as that used by the Commissioner in apportioning the deduction for obsolescence of goodwill as in 5 (c) above as follows:—

1918	12/37	$ 4,523.49
1919	24/37	9,046.98
1920	1/37	376.95
Total as above		$13,947.42

6. The taxpayer, in support of his appeal, relies upon the following propositions of law:

(a) That in computing net income there shall be allowed as deductions:

(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business. Section 214 (a) Revenue Act of 1918

(b) That in computing net income there shall be allowed as deductions:

(8) A reasonable allowance for the exhaustion wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. Section 214 (a) Revenue Act of 1918.

WHEREFORE the taxpayer respectfully prays that this Board may hear and determine his appeal.

W. M. SMITH,
Counsel for Taxpayer,
Address: 505 Transportation Bldg.,
Washington, D. C.

[6] TREASURY DEPARTMENT,
WASHINGTON.

July 29, 1925.

Office of
Commissioner of Internal Revenue
IT–PA:4–60D.
GWF–406.
Mr. Gerald F. Schlesinger,
Flood Building,
San Francisco, Calif.

Sir:

The determination of your income tax liability for the years 1918 and 1919 as set forth in office letter dated October 22, 1924, disclosed a deficiency in tax amounting to $4,657.96.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made or where

a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:4–60D–GWF:406. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,
D. H. BLAIR,
Commissioner.
By (Signed) C. B. ALLEN,
Acting Deputy Commissioner.

Inclosures:
Statements.
Agreement—Form A.

[7] STATEMENT.

IT:PA:4–60D.
GWF–406.

In re: Mr. Gerald F. Schlesinger,
171 Palm Avenue,
San Francisco, Calif.

Years.		Deficiency in tax.
1918	(waiver filed)	$ 409.02
1919	" "	4,248.94
	Total	$4,657.96

An audit of the 1918 partnership income return of Schlesinger and Bender discloses your distributive interest to be $20,912.93 instead of $19,339.76, as reported. The adjustments made in the partnership income are fully explained in a separate communication to Schlesinger and Bender.

An adjustment of this item increases your net income by $1,573.17, which is subject to normal tax at 12% and surtax at 14% or a total tax of $409.02.

It is noted that you reported a loss of $9,717.88 from the partnership of Schlesinger and Bender on your 1919 return, whereas an audit of the 1919 partnership return discloses your corrected distributive interest to be $16,523.65.

The adjustment of this item increases your net income by $26,241.53.

The tax liability on your corrected net income

of $32,702.10 is $4,399.65 and as $150.71 was assessed, there is a deficiency in tax amounting to $4,248.94 for the year 1919.

Consideration has been given to your protest by the Solicitor of Internal Revenue, and the Unit is sustained in determining the above deficiency.

Consideration was also given to the facts contained in your letter of July 8, 1925.

[8] State of California,
City and County of San Francisco.

Gerald F. Schlesinger, being duly sworn says that he is the taxpayer mentioned in the foregoing petition; that he has read the said petition, or had the same read to him, and is familiar with the statements therein contained, and that the facts therein stated are true, except such facts as are stated to be upon information and belief, and those facts he believes to be true.

GERALD F. SCHLESINGER.
By LeRoy F. SCHLESINGER,
Atty.-in-fact.

Sworn before me this 15th day of September, 1925.

L. P. LOVELAND,
Notary Public in and for City and County San Francisco, State of California.

Now, March 1, 1930, the foregoing Petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[9] Filed Oct. 19, 1925. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 7454.

Appeal of GERALD F. SCHLESINGER, San Francisco, California.

ANSWER.

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of the above-named taxpayer, admits, denies and alleges as follows:

(1) Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

(2) Denies that any error was made in the determination of the deficiency in tax set out in the letter of July 29, 1925.

(3) Admits that in its tax return for the period ending December 31, 1918, the copartnership claimed as a deduction the sum of $21,848.60 as exhaustion, wear and tear of tangible properties.

(4) Admits the allegations contained in subparagraphs (b) and (c) of paragraph 5.

(5) Admits that the deduction of $21,848.60 claimed by the taxpayer in its return for the period ending December 31, 1918, was erroneous; denies that the correct amount is $13,947.42 and further denies that the taxpayer is entitled to any deduction on account of obsolescence of its tangible property.

(6) Denies, generally and specifically, each and every allegation in the taxpayer's petition contained not hereinbefore admitted, qualified or denied.

[10] PROPOSITION OF LAW.

The taxpayer is not entitled to any deduction on account of the obsolescence of its tangible properties.

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.

Of Counsel:

M. N. FISHER,
Special Attorney,
Bureau of Internal Revenue.

Now, March 1, 1930, the foregoing answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[11] Recd. Apr. 7, 1927. United States Board of Tax Appeals.

Filed Apr. 8, 1927.

United States Board of Tax Appeals.

DOCKET No. 7454.

GERALD F. SCHLESINGER,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AMENDED ANSWER.

The Commissioner of Internal Revenue by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Denies the allegations contained in paragraph 3 of the petition, and alleges that the taxes in controversy are income taxes for the calendar years 1918 and 1919 and are less than $10,000.00, to wit, $5,532.03.

4. (a) Denies that the Commissioner erred in the determination of the taxes as alleged in subdivision (a) of paragraph 4 of the petition, and alleges that the Commissioner erred in not including in the petitioner's income for the year 1918, $5,709.70 and for the year 1919, $11,419.39, said amounts being the petitioner's distributive interest in $52,814.70 deducted for the taxable years 1918 and 1919 by Schlesinger and Bender as obsolescence of goodwill.

5. (a) Admits that in its tax return for the period ending December 31, 1918, the copartnership claimed as a deduction the sum of $21,848.60, as exhaustion, wear and tear of tangible properties.

5. (b) Admits the allegations contained in subdivision (b) of paragraph 5 of the petition.

[12] 5. (c) Admits the allegations contained in subdivision (c) of paragraph 5 of the petition, and alleges that the obsolescence of goodwill amounting to $52,814.70 deducted by Schlesinger and Bender as alleged in subdivision (c) of paragraph 5 of the petition is not an allowable deduction to said copartnership.

5. (d) Admits that the deduction of $21,848.60 claimed by the copartnership in its return for the period ending December 31, 1918, was erroneous. Denies that the correct amount deductible is $13,947.42 and further denies that the copartnership is entitled to any deduction for obsolescence of its tangible property.

Denies generally and specifically each and every other allegation contained in the petition of the above-named taxpayer not hereinbefore expressly admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal be denied.

A. W. GREGG,
General Counsel,
Attorney for the Commissioner of Internal Revenue.

Of Counsel:

THOMAS M. MATHER,
Special Attorney,
Bureau of Internal Revenue.

Now, March 1, 1930, the foregoing amended answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[13] United States Board of Tax Appeals.

DOCKET No. 7454.

GERALD F. SCHLESINGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

AMENDMENT TO PETITION.

Leave from the United States Board of Tax Appeal, first being had and obtained, the petitioner in the above entitled and numbered cause, hereby files the following amendment to the petition now on file herein, and by way of such amendment adds to and includes in said petition the following allegation:

Petitioner further alleges by way of appeal, that all of the alleged deficiences and taxes claimed or set forth in the said deficiency letter upon which this appeal is predicated and all alleged deficiencies and taxes claimed or set forth in the answer and amendment Answer of the Commissioner of Internal Revenue herein, are forever barred by and under, the provisions of, and periods of limitations contained in, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1919, the Revenue Act of 1920, the Revenue Act of 1921, the Revenue Act of 1924, and the Revenue Act of 1926, and particularly Section 277 of said last named Act.

WHEREFORE, the petitioner respectfully prays that this Board may hear and determine his appeal.

JEROME H. BAYER,
Counsel for Petitioner.

State of California,
City and County of San Francisco.

Gerald F. Schlesinger, being duly sworn, deposes and says that he is the petitioner above named; that he has read the foregoing amendment, or had the same read to him, and is familiar with the statements contained therein and that the facts stated therein are true except such facts as are stated to be upon information and belief and those facts he believes to be true.

GERALD F. SCHLESINGER.

Sworn to before me this 3d day of May, 1927.

[Seal] J. J. KERRIGAN,
Notary Public in and for the City and County of San Francisco.

Now, March 1, 1930, the foregoing amendment to petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[14] DOCKET Nos. 7453 and 7454.

LEON L. MOISE, GERALD F. SCHLESINGER,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER.

It appearing from the record that on May 4, 1927, on motion of petitioner, without objection by respondent, leave was granted petitioner to file amended petitions or amendments to petitions in each of the proceedings, Docket Nos. 7453, 7454, 7455 and 8036. Thereafter petitioner submitted amended petitions in Docket Nos. 7455 and 8036 which were duly filed as of May 4, 1927, and has now submitted amended petitions in Docket Nos. 7453 and 7454. It appearing that the amended petitions in the foregoing mentioned proceedings are such amendments as were authorized May 4, 1927, it is

ORDERED that petitioner's amended petitions submitted in Docket Nos. 7453 and 7454 be received and filed *nunc pro tunc* as of May 4, 1927.

(Signed) BENJAMIN H. LITTLETON,
Member, U. S. Board of Tax Appeals.

Dated Washington, D. C., June 17, 1929.

A true copy.

[Seal] Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Now, March 1, 1930, the foregoing order certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[28] United States Board of Tax Appeals.

DOCKET No. 7454.

GERALD F. SCHLESINGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER OF REDETERMINATION.

Pursuant to the Board's findings of fact and opinion promulgated September 25, 1928, it is

ORDERED AND DECIDED that there are deficiencies in tax in respect of the above-entitled petitioner of $1,848.86 for the year 1918 and $7,182.68 for the year 1919.

(Signed) B. H. LITTLETON,
Member, U. S. Board of Tax Appeals.

Dated Washington, D. C.
Entered Dec. 15, 1928.
A true copy.

Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Now, March 1, 1930, the foregoing order of redetermination certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[29] Filed June 11, 1929.

In the United States Circuit Court of Appeals for the Ninth Circuit.

GERALD F. SCHLESINGER,
Petitioner and Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee.

PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes Gerald F. Schlesinger, the above designated petitioner and appellant (hereinafter called petitioner), and files this petition for the review of the findings of fact and opinion of the United States Board of Tax Appeals in the appeal before said Board designated therein as Docket #7454, promulgated on the 25th day of September, 1928, and the decision and order of redetermination of said Board rendered and entered in said appeal on the 15th day of December, 1928, approving, redetermining and fixing deficiencies in income tax of the petitioner for the calendar years 1918 and 1919 in the amounts of $1,848.86 and $7,182.68, respectively, and your petitioner respectfully shows:

[30] I.

STATEMENT OF THE NATURE OF THE CONTROVERSY.

The respondent and appellee (hereinafter called respondent) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States of America.

The said petitioner made his return of income tax with respect to his income for the year 1918, to the Collector of Internal Revenue at Chicago, Illinois, not later than March 22, 1919, and made his return of income tax with respect to his income for the year 1919 to the Collector of Internal Revenue in the First District of California, not later than March 15, 1920.

Respondent notified petitioner by means of a sixty-day letter, dated July 29, 1925, that a deficiency was disclosed in his tax returns for the years 1918 and 1919, totaling $4,657.96. This deficiency arose, primarily, out of the disallowance of a deduction for obsolescence of the tangible assets of the partnership of Schlesinger & Bender, of which petitioner was a member. This firm was engaged in the wholesale liquor business, with its principal place of business at San Francisco, California. The premises which it occupied were leased premises. The partnership was obliged to, and did, terminate its business in January, 1920, by reason of prohibition legislation, which resulted in the obsolescence both of the tangible assets and goodwill of

the partnership. A deduction for obsolescence of goodwill was [31] allowed to said partnership by the Commissioner of Internal Revenue. A deduction for obsolescence of tangible assets was made upon the income tax return filed by the partnership for the year 1918. This deduction was disallowed by the Commissioner of Internal Revenue, as set forth in said sixty-day letter dated July 29, 1925. From said letter petitioner took an appeal within the time and in the manner provided by law, to the United States Board of Tax Appeals. This appeal was designated in the files of said Board as Docket No. 7454. Said appeal was decided by said Board adversely to said petitioner. It is the proceedings, findings of fact, opinion, decision and order of redetermination of said Board in that appeal which petitioner now seeks to have reviewed and reversed by this Honorable Court.

The questions considered, or ruled upon, by said United States Board of Tax Appeals in said appeal, as well as the questions arising out of the actions, rulings, findings of fact, opinion, decision, and order of redetermination of said Board therein, are, substantially, as follows:

> Whether or not a form of written consent or waiver executed by a taxpayer, is effective to extend the statutory period of limitation for the assessment and/or collection of taxes, without, or before, the approval thereof by the Commissioner of Internal Revenue.
>
> Whether or not a form of written consent or waiver executed and/or filed by a taxpayer

after the expiration of the statutory period of limitation for the assessment and/or collection of taxes, is valid and effective.

[32] Whether or not a written consent or waiver filed with the Commissioner within the statutory period of limitations, but not approved by the Commissioner until after the expiration of said statutory period, is effective.

Whether or not the Commissioner of Internal Revenue had the right to file an amended answer in said appeal, without prior notice to said petitioner, and without prior opportunity of said petitioner to be heard with respect thereto.

Whether or not the Commissioner had the right to insert in his amended answer in said appeal, new matter and matter not mentioned or referred to or incorporated in his sixty-day letter to petitioner, from which letter said appeal was taken.

Whether or not said United States Board of Tax Appeals had jurisdiction to determine alleged deficiencies additional to or greater or other than the alleged deficiency set forth in the sixty-day letter of the Commissioner to petitioner, and in no wise made a part of petitioner's said appeal, and being wholly different in nature and in the facts out of which they arise from that set forth in said sixty-day letter.

Whether or not entries in books of account of said partnership, and the oral testimony of competent witnesses, introduced at the hearing

of said appeal by the petitioner, were sufficient, as a matter of law, to establish the value and rates of depreciation of tangible properties of said partnership, for the obsolescence of which a deduction was claimed, in the absence of any offer of evidence or proof to the contrary by the Commissioner.

Whether or not the Commissioner validly and effectively asserted at or before the hearing of said appeal a claim for deficiency other or greater than, or in addition to, the alleged deficiency set forth in said sixty-day letter.

Whether or not obsolescence of goodwill, occasioned by prohibition legislation, constituted an allowable deduction.

[33] Whether or not obsolescence of tangible assets occasioned by prohibition legislation constituted an allowable deduction, and if so, whether or not said partnership was entitled to apportion the loss resulting from said obsolescence over a period beginning with the time when it first learned that it would be obliged to discontinue its business, and ending with the time when said business was actually terminated by reason of said prohibition legislation.

Whether or not petitioner was entitled to a continuance of said hearing of said appeal.

The foregoing questions were decided by said United States Board of Tax Appeals adversely to petitioner, and the position of petitioner with re-

spect thereto is covered by the assignments of error hereinafter set forth.

II.

DESIGNATION OF COURT OF REVIEW.

Petitioner is a resident of the State of California, and being aggrieved by the said decision, findings of fact, opinion, and order of redetermination of said Board, desires that same be reviewed in accordance with law by the United States Circuit Court of Appeal for the Ninth Circuit.

ASSIGNMENTS OF ERROR.

Petitioner, as a basis for review, assigns the following errors which he avers occurred before and upon the hearing of said cause, by the United States Board of Tax Appeals and in the decision, findings of fact, and opinion, of said Board therein, [34] and in the order of redetermination rendered, given and made in said cause, and upon which errors he relies to reverse said decision and order of redetermination, to wit:

(1) The said Board erred in rendering its decision for respondent herein.

(2) The said Board erred in determining that there were deficiencies in the taxes of petitioner for the years 1918 and 1919 in the amounts of $1,848.86 and $7,182.68, respectively, or in any amount or amounts at all, or any deficiency at all.

(3) The said Board erred in allowing respondent's amended answer herein to be filed without previous notice being given to the petitioner herein,

and in granting respondent's motion for the filing of said amended answer without previous notice to petitioner of said motion, or a hearing thereof.

(4) The said Board erred in refusing to strike the amended answer of respondent herein upon motion duly made by petitioner at the hearing of said cause, and in denying said motion.

(5) The said Board erred in refusing to grant to petitioner and in denying his motion for a continuance of the hearing of said appeal.

(6) The said Board erred in refusing, upon motion duly made therefor by petitioner at the hearing of said cause, to strike from respondent's amended answer an allegation in paragraph 4a thereof, which reads as follows:

> "alleges that the Commissioner erred in not including in Petitioner's income for the year 1918, [35] $5709.70, and for the year 1919, $11,-419.39; said amounts being Petitioner's distributive interest in $52,814.70, deducted for the taxable years 1918 and 1919, by Schlesinger & Bender, as obsolescence of goodwill."

The Board erred in denying said motion.

(7) The said Board erred in refusing, upon motion duly made therefor by petitioner at the hearing of said cause, to strike from respondent's amended answer an allegation of paragraph 5c, which reads as follows:

> "and alleges the obsolescence of goodwill amounting to $52,814.70 deducted by Schlesinger & Bender as alleged in subdivision c of

paragraph 5 of the petition is not an allowable deduction to said copartnership."

The Board erred in denying said motion.

(8) The said Board erred in holding that the so-called affirmative allegations contained in respondent's amended answer, were properly included and might remain therein.

(9) The said Board erred in considering obsolescence of goodwill as an issue in said appeal, and in ruling that it was an issue therein, and in holding that obsolescence of goodwill was made an issue of and in said appeal by the pleadings therein.

(10) The said Board erred in its failure to find or hold that petitioner was entitled to claim deduction for loss occasioned by obsolescence of the furniture, equipment and leasehold improvements of the partnership of Schlesinger & Bender, of which he was a member, and to apportion this loss over the period of eighteen and one-half months, beginning with 1918, when the partnership first learned that it would be obliged to terminate [36] the business, and ending in 1920, when the business was terminated by reason of prohibition legislation.

(11) The said Board erred in its failure to find that improvements on the leasehold of the partnership of Schlesinger & Bender had a value of $7,200.00, and that said value was entirely wiped out by complete obsolescence of said improvements, upon the termination of the lease.

(12) The said Board erred in its failure to find that the value of tangible assets (exclusive of lease-

hold improvements) of the partnership of Schlesinger & Bender, for which obsolescence was claimed, was $13,965.03, and that as a result of said obsolescence the value was reduced to a junk value of $7,-801.18.

(13) The said Board erred in finding that no entries were made on the books of the partnership of Schlesinger & Bender of the sale in 1920 of its furniture and equipment. Said finding is wholly unsupported by and contrary to the evidence.

(14) The said Board erred in its failure to find that the proceeds received by the partnership of Schlesinger & Bender in 1920 from the sales of cooperage, scrap, and office furniture, was the sum of $7,801.18; said cooperage, scrap, and office furniture being part of the property for which a deduction for obsolescence was claimed.

(15) The said Board erred in its failure to find that the partnership of Schlesinger & Bender discontinued on or about January 16, 1920, the use of its leasehold premises.

(16) The said Board erred in its failure to find that deduction for obsolescence of goodwill in the amount of $52,814.70 [37] was, in fact, allowed to copartnership of Schlesinger & Bender by the Commissioner of Internal Revenue.

(17) The said Board erred in finding that a motion was duly granted by the Board for the filing of an amended answer in this proceeding. Said finding is wholly unsupported by and contrary to the evidence.

(18) The said Board erred in finding that at the hearing of this cause, Commissioner contended for an increase of deficiencies, based upon the alleged affirmative allegations in the amended answer with respect to the deduction for obsolescence of goodwill. Said finding is wholly unsupported by and contrary to the evidence.

(19) The said Board erred in holding that any waiver executed by petitioner for 1918, was valid and/or effectively extended the time fixed by law within which assessment could be made for that year.

(20) The said Board erred in holding that any waiver executed by petitioner for 1919, was valid and/or effectively extended the time fixed by law within which assessment could be made for that year.

(21) The said Board erred in failing to hold that a waiver bearing the purported signature of petitioner, dated February 25, 1924, covering 1918, but bearing no stamp of approval earlier than September 25, 1924, was not effective to bar the assessment and/or collection of taxes, the statutory period in which assessment [38] and/or collection could be made, having expired March 22, 1924.

(22) The said Board erred in failing to hold that a waiver bearing the purported signature of petitioner for 1918, dated February 3, 1925, expiring December 31, 1925, and bearing no stamp of approval earlier than March 25, 1925, was invalid and void and did not extend the period fixed by law, said statutory period having expired March 22, 1924.

(23) The said Board erred in failing to hold that a waiver bearing the purported signature of petitioner for the year 1919, dated January 30, 1925, and expiring December 31, 1925, and bearing no stamp of approval earlier than March 25, 1925, was invalid and void and did not extend the period fixed by law, said statutory period having expired March 15, 1925.

(24) The said Board erred in holding that a consent or waiver executed after statutory period of limitations has expired, is valid, and that taxes may be assessed within the period of such consent or waiver.

(25) The said Board erred in holding that a consent or waiver is valid and that taxes may be assessed within the period of such consent or waiver, notwithstanding the fact that such waiver or consent has not been approved by the Commissioner until after the expiration of the statutory period of limitations.

(26) The said Board erred in denying the contention of petitioner with respect to the issue of the statute of limitations.

(27) The said Board erred in holding that the evidence was [39] insufficient as to the value of the tangible assets on account of which obsolescence was claimed.

(28) The said Board erred in holding that there was not sufficient evidence to establish how the book values of the tangible assets for which deduction for obsolescence was claimed, were computed, and in holding that the method of computing said book values was necessary to be proved.

(29) The said Board erred in holding that there was no proof of costs or appropriate rates of depreciation of the tangible assets for which deduction for obsolescence was claimed.

(30) The said Board erred in its failure to hold that the amount sold or salvaged from the furniture and equipment of Schlesinger & Bender in 1920, was $7,801.18.

(31) The said Board erred in finding and holding that it had no basis upon which to determine the amount of obsolescence either of furniture and equipment and/or leasehold improvements, and in denying petitioner's contention upon that issue. Said finding is wholly unsupported by and contrary to the evidence.

(32) The said Board erred in holding that petitioner was not entitled to deduct and could not deduct anything for obsolescence of tangible assets of said partnership of Schlesinger & Bender.

(33) The said Board erred in holding that the Commissioner had erred in allowing the partnership of Schlesinger & Bender a deduction for obsolescence of goodwill.

[40] (34) The said Board erred in holding that the Commissioner did at or before the hearing of said cause, effectively or at all assert a claim for an increased deficiency or for a deficiency in excess of the amount originally determined by him.

(35) The said Board erred in holding that by so-called affirmative allegations in his amended answer, or otherwise, or at all, Commissioner had effectively asserted a claim for an increased de-

ficiency within the meaning of Section 274 E. of the Internal Revenue Act of 1926, or otherwise, or at all.

(36) The said Board erred in finding and holding that the following statements in the amended answer constituted affirmative allegations, to wit: "that the Commissioner erred in not including in the petitioner's income for the year 1918, $5,709.70, and for the year 1919, $11,419.39, said amounts being the petitioner's distributive interest in $52,814.70 deducted for the taxable years 1918 and 1919, for obsolescence of goodwill," and "that the obsolescence of goodwill amounting to $52,814.70 * * * is not an allowable deduction to said copartnership."

(37) The said Board erred in failing to hold that the prayer in said amended answer completely negatived the construction of said amended answer as an assertion of a claim for affirmative relief.

(38) The said Board erred in holding that obsolescence of goodwill is not an allowable deduction from gross income.

(39) The said Board erred in holding that a sufficient claim for additional deficiency or addition in tax is made if the Commissioner [41] affirmatively alleges error in his original determination, together with facts sufficient, if proved, to result in an increase of the net income and the tax of the petitioner over that originally determined by him.

(40) The said Board erred in assuming jurisdiction over and in considering and determining

as issues, matters and items not mentioned in or made subject matter of the Commissioner's letter to petitioner and not otherwise effectively asserted at or before the hearing.

(41) The said Board erred as follows: Said Board failed and refused to allow any deduction for obsolescence of furniture and equipment of the copartnership of Schlesinger & Bender, and to allow a re-apportionment of this deduction over the years 1918, 1919 and 1920; and, notwithstanding this fact, said Board failed to allow any credit to petitioner for his distributive share of the tax paid for 1920 upon $7,801.18, reported as a profit by the copartnership of Schlesinger & Bender in the year 1920, and representing the amount received as salvage by said copartnership of said furniture and equipment.

(42) The said Board erred in overruling the objection of counsel for petitioner to the question put to LeRoy Schlesinger, and set forth on pages 58 and 59 of the transcript of the proceeding upon said appeal, and reading as follows:

> "Q. And did they ever claim a deduction for the obsolescence of goodwill for prohibition purposes in those returns?
>
> Mr. BAYER.—I should like, at this time, to interpose an [42] objection to all questions, relating to obsolescence of goodwill, and to save time, I ask that that same objection be preserved with respect to all questions with reference thereto.
>
> Mr. VAN FOSSAN, Member.—The objection is overruled."

(43) The said Board erred in making an order of redetermination and/or decision pursuant to the Board's findings of fact and opinion promulgated September 25, 1928.

(44) The said Board erred in ordering and deciding that there is any deficiency or tax or sum of money due, collectible, and/or assessable from or against the above-named petitioner, for the years 1918 and 1919.

(45) The said Board erred in that its decision rendered in said appeal is contrary to and against law.

(46) The said Board erred in ordering the entry of judgment under Rule 50 pursuant to the prevailing opinion of the Board rendered in said appeal.

WHEREFORE, the above-mentioned petitioner herein prays that the United States Circuit Court of Appeals for the Ninth Circuit, review the action of the said United States Board of Tax Appeals in this cause, and reverse said decision and order of redetermination of said Board, and direct and order the making an entry of a decision and order by said Board in favor of the petitioner, determining that there is no deficiency or increased deficiency in income taxes due, collectible and/or assessable from the petitioner for the years 1918 and 1919, and that there is no tax or amount at [43] all due, collectible and/or assessable from or against said petitioner for the years 1918 and 1919, and that the Clerk of said Board be directed to transmit and deliver to the Clerk of the United States Circuit

Court of Appeals for the Ninth Circuit, certified copies of each and all of the documents necessary and material to the presentation and consideration of the foregoing petition for review, and as required by the rules of said court and by law, and for such other and further relief as may to this court appear proper in the premises.

And your petitioner will ever pray.

GERALD F. SCHLESINGER,
Petitioner and Appellant.

JEROME H. BAYER,
Attorneys for Petitioner and Appellant,
1225 Crocker First National Bank Building,
San Francisco, California.

[44] State of California,
City and County of San Francisco,—ss.

Gerald F. Schlesinger, being first duly sworn, on oath deposes and says:

That he is the petitioner and appellant above named; that he has read the foregoing petition; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true; and that the said petition is filed in good faith.

GERALD F. SCHLESINGER.

Subscribed and sworn to before me this 29th day of May, 1929.

[Seal] LAURA E. HUGHES,
Notary Public in and for the City and County of San Francisco, State of California.

[45] Filed Jun. 13, 1929. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 7454.

GERALD F. SCHLESINGER,
Petitioner and Appellant,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee.

NOTICE.

To Hon. C. M. Charest, General Counsel, Bureau of Internal Revenue, Washington, D. C.

You are hereby notified that the above-named petitioner this 8th day of June, 1929, filed with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision, findings of fact, opinion, and order of redetermination of said Board in the above-entitled matter. A copy of said petition for review and assignments of error as filed is attached hereto.

JEROME H. BAYER,
_____,
Attorneys for Petitioner and Appellant,
1225 Crocker First National Bank Bldg.,
San Francisco, California.

I hereby this 8 day of June, 1929, accept personal service of a copy of the petition to review and assignments of error in the above-entitled matter together with notice of the filing thereof.

(S.) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue, for Respondent and Appellee.

Now, March 1, 1930, the foregoing petition for review with proof of service certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[46] Filed Feb. 12, 1930. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 7454.

GERALD F. SCHLESINGER,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STIPULATION.

It is hereby stipulated and agreed by and between the parties in the above-entitled cause through their respective attorneys that the statement of evidence as approved by a member of the Board of Tax Appeals in the case of Leon L. Moise, Docket No.

7453, is hereby incorporated by reference and the same shall constitute the statement of evidence in the above-entitled cause.

J. S. Y. IVINS,
Associate Counsel for Petitioner.
C. M. CHAREST.
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Now, March 1, 1930, the foregoing stipulation certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Endorsed]: No. 6180. United States Circuit Court of Appeals for the Ninth Circuit. Gerald F. Schlesinger, Petitioner, vs. David Burnet, Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed July 1, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States

Circuit Court of Appeals

For the Ninth Circuit.

LEROY SCHLESINGER,

Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue,

Respondent.

Transcript of Record.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

No. 6181—INDEX TO TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

[3] Filed Sept. 24, 1925.

United States Board of Tax Appeals.

DOCKET No. 7455.

Appeal of LeROY SCHLESINGER, Flood Building, San Francisco, Calif.

PETITION.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter IT:PA:-4–60D GWF406 dated July 29, 1925, and as the basis of his appeal sets forth the following:

1. The taxpayer is an individual with his place of business in the Flood Building, San Francisco, California. He was formerly a member of the copartnership Schlesinger and Bender with its principal office at the same address.
2. The deficiency letter (a copy of which is attached) was mailed to the taxpayer July 29, 1925.
3. The taxes in controversy are income taxes for the calendar years 1918, 1919 and 1920 and are less than $10,000.00 to wit $1,413.43. Claims for abatement have been filed in respect of assessments made for the years 1918 and 1919 under Section 274 (d) of the Revenue Act of 1924. The amount of taxes in controversy for the year 1920 is $163.08. Nothing is included in the above, however, for any adjustment which will be rendered necessary upon the

Treasury Department's acceptance of California taxpayers' returns filed on a community property basis.

4. The determination of the tax contained in the said deficiency letter is based upon the following error:—

   (a) Failure by the Commissioner to allow as a deduction from the income in the tax returns filed by Schlesinger and Bender a loss amounting to $13,947.42 sustained in the calendar years 1918, 1919 and 1920 due to the enactment of prohibition legislation, thus increasing the *pro rata* share of partnership income taxable to the taxpayer.

5. The facts upon which the taxpayer relies as the basis of his appeal are as follows:

   (a) In its tax return for the six months period ending December 31, 1918, the copartnership Schlesinger and Bender claimed as a deduction [4] the sum of $21,848.60 as exhaustion, wear and tear (including obsolescence) of tangible properties. This sum consisted of the following balances:

Unamortized balance of buildings on leased ground account	$ 7,200.00
Balance of cooperage, furniture and fixture account	13,965.03
Additional depreciation not charged on books (details not now available)	683.57
Total as above	$21,848.60

(b) In its tax return for the calendar year 1920 the copartnership of Schlesinger and Bender reported as income the sum of $7,801.18 being the total proceeds from sales of cooperage, scrap and office furniture.

(c) The Commissioner in his letter dated October 22, 1924, file IT:PA:4 GWF406 allowed as a deduction to Schlesinger and Bender obsolescence of goodwill amounting to $52,814.70 apportionable between the years 1918, 1919 and 1920 as follows:

1918	12/37	$17,129.09
1919	24/37	34,258.19
1920	1/37	1,427.42
As above		$52,814.70

(d) The deduction mentioned in paragraph 5 (a) above as originally claimed by the copartnership was in error and, as in paragraph 4 above, the correct deductible amount is $13,947.42 made up as follows:

Unamortized balance of buildings on leased ground, reverted to lessor January 16, 1920			$7,2
Cooperage, furniture, fixtures etc., book value		$13,965.03	
Less:			
Proceeds of sales originally reported as income in the year 1920	$7,801.18		
Estimated value of office furniture retained	100.00	7,901.18	6,0
	Forward,		$13,2
[5] Forward			$13,2
Additional depreciation not charged on books (the details of this item are not now available, but the amount is reasonable because no other depreciation was claimed)			6
Total			$13,9

The above amount should, it is believed, be apportioned in the same manner as that used by the Commissioner in apportioning the deduction for obsolescence of goodwill as in 5(c) above, as follows:

1918	12/37	$ 4,523.49
1919	24/37	9,046.98
1920	1/37	376.95
Total as above		$13,947.42

6. The taxpayer in support of his appeal relies upon the following propositions of law:

(a) That in computing net income there shall be allowed as deductions—

(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business.

Section 214(a) Revenue Act of 1918.

(b) That in computing net income there shall be allowed as deductions—

(8) A reasonable allowance for the exhaustion wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence.

Section 214(a) Revenue Act of 1918.

WHEREFORE the taxpayer respectfully prays that this Board may hear and determine this appeal.

W. M. SMITH,
Counsel for Taxpayer,
Address: 505 Transportation Bldg.,
Washington, D. C.

[6] TREASURY DEPARTMENT,
WASHINGTON.

Office of
Commissioner of Internal Revenue
IT:PA:4–60D.
GWF–406.
Mr. LeRoy Schlesinger,
Palace Hotel,
San Francisco, Calif.

July 29, 1925.

Sir:

The determination of your income tax liability for the year 1920 as set forth in office letter dated October 22 1924 disclosed a deficiency in tax amounting to $153.08.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the

inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:4–60D–GWF:406. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,
D. H. BLAIR,
Commissioner.
By (Signed) C. B. ALLEN,
Acting Deputy Commissioner.

Inclosures:
Statements.
Agreement—Form A.

[7] STATEMENT.

IT:PA:4–60D.
GWF–406.

In re: Mr. LeRoy Schlesinger,
Palace Hotel,
San Francisco, Calif.
1920.

Deficiency in Tax—$153.08.

Your distributive interest from Schlesinger and Bender for 1920 is $13,342.16, instead of $12,248.76. The adjustment of this item increases your net income by $1,093.40, which is subject to normal tax of 8% and surtax of 6%, or a total tax of $153.08.

There is, therefore, a deficiency of $153.08 for 1920.

[8] State of California,
City and County of San Francisco.

Leroy Schlesinger, being duly sworn says that he is the taxpayer mentioned in the foregoing petition; that he has read the said petition, or had the same read to him, and is familiar with the statements therein contained, and that the facts therein stated are true, except such facts as are stated to be upon information and belief, and these facts he believes to be true.

LeROY SCHLESINGER.

Sworn before me this 15th day of September, 1925.

L. P. LOVELAND,
Notary Public in and for City and County San Francisco, State of California.

Now, March 1, 1930, the foregoing petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[9] Filed Oct. 19, 1925. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 7455.

Appeal of LeROY SCHLESINGER, San Francisco, California.

ANSWER.

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of the above-named taxpayer, admits, denies and alleges as follows:

(1) Admits the allegations contained in paragraphs 1, 2 and 3 of the petition; except that he denies that the taxes for 1919 are in controversy and further denies that any deficiency letter with respect to the said year 1919 has been sent to the taxpayer.

(2) Denies that any error was made in the determination of the deficiency in tax set out in the letter of July 29, 1925.

(3) Admits that in its tax return for the period ending December 31, 1918, the copartnership claimed as a deduction the sum of $21,848.60 as exhaustion, wear and tear of tangible properties.

(4) Admits the allegations contained in subparagraphs (b) and (c) of paragraph 5.

(5) Admits that the deduction of $21,848.60 claimed by the taxpayer in its return for the period ending December 31, 1918, was erroneous; denies that the correct amount is $13,947.42 and further denies that the taxpayer is entitled to any deduction on account of obsolescence of its tangible property.

(6) Denies, generally and specifically, each and every allegation in the taxpayer's petition contained not hereinbefore admitted, qualified or denied.

[10] PROPOSITION OF LAW.

The taxpayer is not entitled to any deduction on account of the obsolescence of its tangible properties.

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.

Of Counsel:
M. N. FISHER,
Special Attorney,
Bureau of Internal Revenue.

Now, March 1, 1930, the foregoing answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[11] Recd. Apr. 7, 1927. United States Board of Tax Appeals.

Filed Apr. 8, 1927.

United States Board of Tax Appeals.

DOCKET No. 7455.

LeROY SCHLESINGER,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AMENDED ANSWER.

The Commissioner of Internal Revenue by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Denies the allegations contained in paragraph 3 of the petition, and says that the taxes in controversy are income taxes for the calendar year 1920 and are less than $10,000.00, to wit, $219.68.

4. Denies that the Commissioner erred in the manner alleged in subdivision (a) of paragraph 4 of the petition, and alleges that the Commissioner erred in not including as income $475.60, said amount being the petitioner's distributive interest in $1,427.42, deducted by Schlesinger and Bender as obsolescence of goodwill for the year 1920.

5.(a) Admits that in its tax return for the period ending December 31, 1918, the copartnership claimed as a deduction the sum of $21,848.60, as exhaustion, wear and tear of tangible properties.

5.(b) Admits the allegations contained in subdivision (b) of paragraph 5 of the petition.

[12] 5.(c) Admits the allegations contained in subdivision (c) of paragraph 5 of the petition, and alleges that the obsolescence of goodwill amounting

to $52,814.70 deducted by Schlesinger and Bender as alleged in subdivision (c) of paragraph 5 of the petition is not an allowable deduction to said copartnership.

5.(d) Admits that the deduction of $21,848.60 claimed by the copartnership in its return for the period ending December 31, 1918, was erroneous. Denies that the correct amount deductible is $13,947.42, and further denies that the copartnership is entitled to any deduction for obsolescence of its tangible property.

Denies generally and specifically each and every other allegation contained in the petition of the above-named taxpayer not hereinbefore expressly admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal be denied.

A. W. GREGG,
General Counsel,
Attorney for the Commissioner of Internal Revenue.

Of Counsel:
THOMAS M. MATHER,
Special Attorney,
Bureau of Internal Revenue.

Now, March 1, 1930, the foregoing amended answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[13] Filed at Hearing May 4, 1927. U. S. Board of Tax Appeals. Div. ——. Docket 7455.

United States Board of Tax Appeals.

DOCKET No. 7455.

LeROY SCHLESINGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

AMENDMENT TO PETITION.

Leave from United States Board of Tax Appeals, first being had and obtained the petitioner in the above entitled and numbered cause, hereby files the following amendment to the petition now on file herein, and by way of such amendment adds to and includes in said petition the following allegation:

Petitioner further alleges by way of appeal, that all of the alleged deficiencies and taxes claimed or set forth in the said deficiency letter upon which this appeal is predicated and all alleged deficiencies and taxes claimed or set forth in the answer and amendment answer of the Commissioner of Internal Revenue herein, are forever barred by and under, the provisions of, and periods of limitations contained in, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1919, the Revenue Act of 1920, the Revenue Act

of 1921, the Revenue Act of 1924, and the Revenue Act of 1926, and particularly Section 277 of said last named Act.

WHEREFORE, the petitioner respectfully prays that this Board may hear and determine his appeal.

JEROME H. BAYER,
Counsel for Petitioner.

State of California,
City and County of San Francisco.

LeRoy Schlesinger, being duly sworn, deposes and says that he is the petitioner above named; that he has read the foregoing amendment, or had the same read to him, and is familiar with the statements contained therein and that the facts stated therein are true except such facts as are stated to be upon information and belief and those facts he believes to be true.

LeROY SCHLESINGER.

Sworn to before me this 3d day of May, 1927.

[Seal] J. J. KERRIGAN,
Notary Public in and for the City and County of San Francisco.

Now, March 1, 1930, the foregoing Amendment to Petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[27] United States Board of Tax Appeals.

DOCKET Nos. 7455 and 8036.

LeROY SCHLESINGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER OF REDETERMINATION.

Pursuant to the Board's findings of fact and opinion promulgated September 25, 1928, IT IS ORDERED AND DECIDED that there are deficiencies in tax in respect of the above-entitled petitioner of $1,529.19 for the year 1918, and $219.68 for the year 1920.

(Signed) B. H. LITTLETON,
Member, U. S. Board of Tax Appeals.

Dec. 14, 1928.

Dated Washington, D. C.

A true copy.

Teste: B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Now, March 1, 1930, the foregoing Order of Redetermination certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[28] Filed June 11, 1929.

In the United States Circuit Court of Appeals for the Ninth Circuit.

LeROY SCHLESINGER,
Petitioner and Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee.

PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes LeRoy Schlesinger, the above designated petitioner and appellant (hereinafter called petitioner), and files this petition for the review of the findings of fact and opinion of the United States Board of Tax Appeals in the appeal before said Board designated therein as Docket #7455, promulgated on the 25th day of September, 1928, and the decision and order of redetermination of said Board rendered and entered in said appeal on the 14th day of December, 1928, approving, redetermining and fixing deficiencies in income tax of the petitioner for the calendar year 1920 in the amount of $219.68, and your petitioner respectfully shows:

[29] I.

STATEMENT OF THE NATURE OF THE CONTROVERSY.

The respondent and appellee (hereinafter called Respondent) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States of America.

The said petitioner and appellant (hereinafter called petitioner) made his return of income taxes with respect to his income for the year 1920 to the Collector of Internal Revenue at San Francisco, California, not later than March 15th, 1921.

Respondent notified petitioner by means of a sixty-day letter dated July 29, 1925, that a deficiency was disclosed in his tax return for the year 1920, amounting to $153.08. This deficiency arose primarily out of the disallowance of a deduction of obsolescence of the tangible assets of the partnership of Schlesinger & Bender, of which petitioner was a member. This firm was engaged in the wholesale liquor business, with its principal place of business at San Francisco, California. The premises which it occupied were leased premises. The partnership was obliged to, and did terminate its business in January, 1920, by reason of prohibition legislation, which resulted in the obsolesence both of the tangible assets and goodwill of the partnership. A deduction for obsolescence of goodwill was allowed to said partnership by the Commissioner of Internal Revenue. A deduction for

obsolescence of tangible assets was made upon the income tax return filed by the partnership for the year 1918. This deduction was disallowed by the Commissioner as set forth in said sixty-day letter dated July 29, 1925. From [30] said letter petitioner took an appeal within the time and in the manner provided by law to the United States Board of Tax Appeals. This appeal was designated in the files of said Board as Docket No. 7455. Said appeal was decided by said Board adversely to said petitioner. It is the proceedings, findings of fact, opinion, decision and order of redetermination of said Board in that appeal which petitioner now seeks to have reviewed and reversed by this Honorable Court.

The questions considered or ruled upon by said United States Board of Tax Appeals in said appeal, as well as the questions arising out of the actions, rulings, findings of fact, opinion, decision, and order of redetermination of said Board therein, are substantially as follows:

> Whether or not the Commissioner of Internal Revenue had the right to file an amended answer in said appeal, without prior notice to said petitioner, and without prior opportunity of said petitioner to be heard with respect thereto.
>
> Whether or not the Commissioner had the right to insert in his amended answer in said appeal, new matter and matter not mentioned or referred to or incorporated in his sixty-day

letter to petitioner, from which letter said appeal was taken.

Whether or not said United States Board of Tax Appeals had jurisdiction to determine alleged deficiencies additional to or greater or other than the alleged deficiency set forth in the sixty-day letter of the Commissioner to petitioner, and in nowise made a part of petitioner's said appeal, and being wholly different in nature and in the said facts out of which they arise from that set forth in said sixty-day letter.

Whether or not entries in books of account of said partnership and the oral testimony of competent witnesses introduced at the hearing of said appeal by the petitioner, were sufficient, as a matter of law, to establish the value and rates of depreciation of tangible properties of said partnership [31] for the obsolescence of which a deduction was claimed, in the absence of any offer of evidence or proof to the contrary by the Commissioner.

Whether or not the Commissioner validly and effectively asserted at or before the hearing of said appeal a claim for deficiency other or greater than or in addition to alleged deficiency set forth in said sixty-day letter.

Whether or not obsolescence of goodwill occasioned by prohibition legislation constituted an allowable deduction.

Whether or not obsolescence of tangible assets occasioned by prohibition legislation constituted an allowable deduction, and if so,

whether or not said partnership was entitled to apportion the loss resulting from said obsolescence over a period beginning with the time when it first learned that it would be obliged to discontinue its business and ending with the time when said business was actually terminated by reason of said prohibition legislation.

Whether or not petitioner was entitled to a continuance of said hearing of said appeal.

Whether or not Commissioner was barred by expiration of statutory period of limitations from claiming or collecting any defficiency greater or other than or in addition to the alleged deficiency set forth in said sixty-day letter to petitioner.

The foregoing questions were decided by said United States Board of Tax Appeals adversely to petitioner, and the position of petitioner with respect thereto is covered by the assignments of error hereinafter set forth.

II.

DESIGNATION OF COURT OF REVIEW.

Petitioner is and was at all times herein mentioned an inhabitant of the State of California residing in the Town of Burlingame in said State, and being aggrieved by the said [32] decision, findings of fact, opinion and order of redetermination of said Board, desires that the same be reviewed in accordance with law by the United States Circuit Court of Appeals for the Ninth Circuit.

ASSIGNMENTS OF ERROR.

Petitioner as a basis for review, assigns the following errors which he avers occurred before and upon the hearing of said cause by the United States Board of Tax Appeals and in the decision, findings of fact and opinion of said Board therein, and in the order of redetermination rendered, given and made in said cause, and upon which errors he relies to reverse said decision and order of redetermination, to wit:

(1) That said Board erred in rendering its decision for respondent herein.

(2) That said Board erred in determining that there is a deficiency in the taxes of petitioner for the year 1920 in the amount of $219.68, or in any amount or amounts at all, or any deficiency at all.

(3) The said Board erred in allowing respondent's amended answer herein to be filed without previous notice being given to the petitioner herein and in granting respondent's motion for the filing of said amended answer without previous notice to petitioner of said motion or a hearing thereof.

(4) The said Board erred in refusing to strike the amended answer of respondent herein upon motion duly made by petitioner at the hearing of said cause and in denying said [33] motion.

(5) The said Board erred in refusing to grant to petitioner and in denying his motion for a continuance of the hearing of said appeal.

(6) The said Board erred in refusing, upon motion duly made therefor by petitioner at the hear-

ing of said cause, to strike from respondent's amended answer an allegation in Paragraph 4 thereof, which reads as follows: "alleges that the Commissioner erred in not including as income $475.80, said amount being the petitioner's distributive interest in $1,427.42, deducted by Schlesinger & Bender as obsolescence of goodwill for the year 1920." The Board erred in denying said motion.

(7) The said Board erred in refusing, upon motion duly made therefor by petitioner at the hearing of said cause, to strike from respondent's amended answer an allegation of Paragraph 5c which reads as follows: "and alleges that the obsolescence of goodwill amounting to $52,814.70 deducted by Schlesinger & Bender as alleged in subdivision c of paragraph 5 of the petition is not an allowable deduction to said copartnership." The Board erred in denying said motion.

(8) The said Board erred in holding that the so-called affirmative allegations contained in respondent's amended answer were properly included and might remain therein.

(9) The said Board erred in considering obsolescence of goodwill as an issue in said appeal and in ruling that it was an issue therein and in holding that obsolescence of goodwill [34] was made an issue of and in said appeal by the pleadings therein.

(10) The said Board erred in its failure to find or hold that petitioner was entitled to claim deduction for loss occasioned by obsolescence of the furniture, equipment and leasehold improvements of the partnership of Schlesinger & Bender, of which

he was a member, and to apportion this loss over the period of eighteen and one-half months beginning with 1918 when the partnership first learned that it would be obliged to terminate the business, and ending in 1920 when the business was terminated by reason of prohibition legislation.

(11) The said Board erred in its failure to find that improvements on the leasehold of the partnership of Schlesinger & Bender had a value of $7,-200.00, and that said value was entirely wiped out by complete obsolescence of said improvements upon the termination of the lease.

(12) The said Board erred in its failure to find that the value of tangible assets (exclusive of leasehold improvements) of the partnership of Schlesinger & Bender for which obsolescence was claimed was $13,965.03, and that as a result of said obsolescence the value was reduced to a junk value of $7,-801.18.

(13) The said Board erred in finding that no entries were made on the books of the partnership of Schlesinger & Bender of the sale in 1920 of its furniture and equipment. Said finding is wholly unsupported by and contrary to the evidence.

(14) The said Board erred in its failure to find that the proceeds received by the partnership of Schlesinger & Bender [35] in 1920 from the sales of cooperage, scrap and office furniture was the sum of $7,801.18, said cooperage, scrap and office furniture being part of the property for which a deduction for obsolescence was claimed.

(15) The said Board erred in its failure to find

that the partnership of Schlesinger & Bender discontinued on or about January 16th, 1920, the use of its leasehold premises.

(16) The said Board erred in its failure to find that deduction for obsolescence of goodwill in the amount of $52,814.70 was in fact allowed to copartnership of Schlesinger & Bender by the Commissioner of Internal Revenue.

(17) The said Board erred in finding that a motion was duly granted by the Board for the filing of an amended answer in this proceeding. Said finding is wholly unsupported by and contrary to the evidence.

(18) The said Board erred in finding that at the hearing of this cause Commissioner contended for an increase of deficiencies based upon the alleged affirmative allegations in the amended answer with respect to the deduction for obsolescence of goodwill. Said finding is wholly unsupported by and contrary to the evidence.

(19) The said Board erred in failing to hold that even if the allegations contained in the amended answer filed on April 8, 1927, had constituted the valid assertion of a claim for additional deficiency that claim for such additional deficiency was nevertheless forever barred by reason of the expiration prior thereto of the statutory period of limitation.

[36] (20) The said Board erred in denying the contention of petitioner with respect to the issue of the statute of limitations.

(21) The said Board erred in holding that the evidence was insufficient as to the value of the tan-

gible assets on account of which obsolescence was claimed.

(22) The said Board erred in holding that there was not sufficient evidence to establish how the book values of the tangible assets for which deduction for obsolescence was claimed were computed, and in holding that the method of computing said book values was necessary to be proved.

(23) The said Board erred in holding that there was no proof of costs or appropriate rates of depreciation of the tangible assets for which deduction for obsolescence was claimed.

(24) The said Board erred in its failure to hold that the amount sold or salvaged from the furniture and equipment of Schlesinger & Bender in 1920 was $7,801.18.

(25) The said Board erred in finding and holding that it had no basis upon which to determine the amount of obsolescence either of furniture and equipment and/or leasehold improvements, and in denying petitioner's contention upon that issue. Said finding is wholly unsupported by and contrary to the evidence.

(26) The said Board erred in holding that petitioner was not entitled to deduct and could not deduct anything for obsolescence of tangible assets of said partnership of Schlesinger & Bender.

(27) The said Board erred in holding that the Commissioner [37] had erred in allowing the partnership of Schlesinger & Bender a deduction for obsolescence of goodwill.

(28) The said Board erred in holding that the Commissioner did at or before the hearing of said

cause effectively or at all assert a claim for an increased deficiency or for a deficiency in excess of the amount originally determined by him.

(29) The said Board erred in holding that by so-called affirmative allegations in his amended answer or otherwise or at all Commissioner had effectively asserted a claim for an increased deficiency within the meaning of Section 274E of the Internal Revenue Act of 1926, or otherwise or at all.

(30) The said Board erred in finding and holding that the following statements contained in the amended answer constituted affirmative allegations, to wit: "That the Commissioner erred in not including as income $475.80, said amount being petitioner's distributive interest in $1,427.42 deducted by Schlesinger & Bender as obsolescence of goodwill for the year 1920," and "that the obsolescence of goodwill amounting to $52,814.70 * * * is not an allowable deduction to said copartnership.

(31) The said Board erred in failing to hold that the prayer in said amended answer completely negatived the construction of said amended answer as an assertion of a claim for affirmative relief.

(32) The said Board erred in holding that obsolescence of goodwill is not an allowable deduction from gross income.

(33) The said Board erred in holding that a sufficient [38] claim for additional deficiency or addition in tax is made if the Commissioner affirmatively alleges error in his original determination together with facts sufficient, if proved, to result in an increase of the net income and the tax of the petitioner over that originally determined by him.

(34) The said Board erred in assuming jurisdiction over and in considering and determining as issues matters and items not mentioned in or made subject matter of the Commissioner's letter to petitioner and not otherwise effectively asserted at or before the hearing.

(35) The said Board erred as follows: Said Board failed and refused to allow any deduction for obsolescence of furniture and equipment of the copartnership of Schlesinger & Bender and to allow a reapportionment of this deduction over the years 1918, 1919 and 1920; and notwithstanding this fact said Board failed to allow any credit to petitioner for his distributive share of the tax paid for 1920 upon $7,801.18, reported as a profit by his copartnership of Schlesinger & Bender in the year 1920, and representing the amount received as salvage by said copartnership of said furniture and equipment.

(36) The said Board erred in overruling the objection of counsel for petitioner to the question put to LeRoy Schlesinger and set forth on pages 58 and 59 of the transcript of the proceeding upon said appeal, and reading as follows:

"Q. And did they ever claim a deduction for the obsolescence of goodwill for prohibition purposes in those returns?

[39] Mr. BAYER.—I should like, at this time, to interpose an objection to all questions, relating to obsolescence of goodwill, and to save time, I ask that that same objection be preserved with respect to all questions with reference thereto.

Mr. VAN FOSSAN, Member.—The objection is overruled."

(37) The said Board erred in making an order of redetermination and/or decision pursuant to the Board's findings of fact and opinion promulgated September 25, 1928.

(38) The said Board erred in ordering and deciding that there is any deficiency tax or sum of money due, collectible and/or assessable from or against the above-entitled petitioner for the year 1920.

(39) The said Board erred in that its decision rendered in said appeal is contrary to and against law.

(40) The said Board erred in ordering the entry of judgment under Rule 50 pursuant to the prevailing opinion of the Board rendered in said appeal.

WHEREFORE, the above-mentioned petitioner herein prays that the United States Circuit Court of Appeals for the Ninth Circuit review the action of the said United States Board of Tax Appeals in this cause and reverse said decision and order of redetermination of said Board, and direct and order the making and entry of a decision and order by said Board in favor of the petitioner determining that there is no deficiency or increased deficiency in income taxes due, collectible and/or assessable from the petitioner for the year 1920, and that [40] there is no tax or amount at all due, collectible and/or assessable from or against said petitioner for 1920, and that the Clerk of said Board be directed to transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit certified copies of each and all of the

documents necessary and material to the presentation and consideration of the foregoing petition for review and as required by the rules of said court and by law, and for such other and further relief as may to this Court appear proper in the premises.

And your petitioner will ever pray.

LeROY SCHLESINGER,
Petitioner and Appellant.

JEROME H. BAYER,
_____,
Attorneys for Petitioner and Appellant,
1225 Crocker First National Bank Building,
San Francisco, California.

[41] State of California,
City and County of San Francisco,—ss.

LeRoy Schlesinger, being first duly sworn, on oath deposes and says:

That he is the petitioner and appellant above named; that he has read the foregoing petition; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true; and that the said petition is filed in good faith.

LeROY SCHLESINGER.

Subscribed and sworn to before me this 29th day of May, 1929.

[Seal] LAURA E. HUGHES,
Notary Public in and for the City and County of San Francisco, State of California.

[42] Filed Jun. 13, 1929. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 7455.

LeROY SCHLESINGER,
Petitioner and Appellant,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee.

NOTICE.

To Hon. C. M. Charest, General Counsel, Bureau of Internal Revenue, Washington, D. C.

You are hereby notified that the above-named petitioner this 8th day of June, 1929, filed with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision, findings of fact, opinion, and order of redetermination of said Board in the above-entitled matter. A copy of said petition for review and assignments of error as filed is attached hereto.

JEROME H. BAYER,

_____,

Attorneys for Petitioner and Appellant,
1225 Crocker First National Bank Bldg.,
San Francisco, California.

I hereby this 8 day of June, 1929, accept personal service of a copy of the petition to review and assignments of error in the above-entitled matter together with notice of the filing thereof.

(S.) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue, for Respondent and Appellee.

Now, March 1, 1930, the foregoing petition for review and proof of service certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[43] Filed Feb. 12, 1930. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 7455.

LeROY SCHLESINGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STIPULATION RE STATEMENT OF EVIDENCE.

It is hereby stipulated and agreed by and between the parties in the above-entitled cause through their respective attorneys that the statement of evidence as approved by a member of the Board of Tax Appeals in the case of Leon L. Moise, Docket No. 7453,

is hereby incorporated by reference and the same shall constitute the statement of evidence in the above-entitled cause.

J. S. Y. IVINS,
Associate Counsel for Petitioner,
c/o HOLMES, BREWSTER & IVINS,
815 Fifteenth Street, N. W.,
Washington, D. C.

C. M. CHAREST.
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Now, March 1, 1930, the foregoing Stipulation certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Endorsed]: No. 6181. United States Circuit Court of Appeals for the Ninth Circuit. LeRoy Schlesinger, Petitioner, vs. David Burnet, Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review an Order of the United States Board of Tax Appeals. Filed July 1, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States
Circuit Court of Appeals
For the Ninth Circuit.

LEROY SCHLESINGER,

Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue,

Respondent.

Transcript of Record.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

No. 6182—INDEX TO TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

[3] Filed Oct. 12, 1925.

United States Board of Tax Appeals.

DOCKET No. 8036.

Appeal of LeROY SCHLESINGER, Flood Building, San Francisco, Calif.

PETITION.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter IT:PA:4–60D GWF406 dated September 4, 1925, and as the basis of his appeal sets forth the following:

1. The taxpayer is an individual with his place of business in the Flood Building, San Francisco, California. He was formerly a member of the copartnership Schlesinger and Bender with its principal office at the same address.
2. The deficiency letter (a copy of which is attached) was mailed to the taxpayer September 4, 1925.
3. The taxes in controversy are income taxes for the calendar years 1918, 1919 and 1920 and are less than $10,000.00 to wit, $1,413.43. Claims for abatement have been filed in respect of assessments made for the years 1918 and 1919 under Section 274 (d) of the Revenue Act of 1924. The amount of taxes in controversy for the year 1920 is $153.08. Nothing is included in the above, however, for

any adjustment which will be rendered necessary upon the Treasury Department's acceptance of California taxpayers' returns filed on a community property basis.

4. The determination of the tax contained in the said deficiency letter is based upon the following error:
   (a) Failure by the Commissioner to allow as a deduction from income in the tax returns filed by Schlesinger and Bender a loss amounting to $13,947.42 sustained in the calendar years 1918, 1919 and 1920 due to the enactment of prohibition legislation, thus increasing the *pro rata* share of partnership income taxable to the taxpayer.
5. The facts upon which the taxpayer relies as the basis of his appeal are as follows:
   (a) In its tax return for the six months period ending December 31, 1918, the copartnership Schlesinger and Bender claimed as a deduction [4] the sum of $21,848.60 as exhaustion, wear and tear (including obsolescence) of tangible properties. This sum consisted of the following balances:

Unamortized balance of buildings on leased ground account	$ 7,200.00
Balance of cooperage, furniture and fixture account	13,965.03

Additional depreciation not charged on books (details not now available).. 683.57

Total as above.....$21,848.60

(b) In its tax return for the calendar year 1920 the copartnership of Schlesinger and Bender reported as income the sum of $7,801.18 being the total proceeds from sales of cooperage, scrap and office furniture.

(c) The Commissioner in his letter dated October 22, 1924, file IT:PA:4 GWF-406 allowed as a deduction to Schlesinger and Bender obsolescence of goodwill amounting to $52,814.70 apportionable between the years 1918, 1919 and 1920 as follows:

1918	12/37	$17,129.09
1919	24/37	34,258.19
1920	1/37	1,427.42
	As above	$52,814.70

(d) The deduction mentioned in paragraph 5(a) above as originally claimed by the copartnership was in error and, as in paragraph 4 above, the correct deductible amount is $13,947.42 made up as follows:

Unamortized balance of buildings on leased ground, reverted to lessor January 16 1920.....			$7,2
Cooperage, furniture, fixtures, etc., book value.....		$13,965.03	
Less:			
Proceeds of sales originally reported as income in the year 1920.....$7,801.18			
Estimated value of office furniture retained	100.00	7,901.18	6,0
Forward, ...			$13,2
[5] Forward, ...			$13,2
Additional depreciation not charged on books (the details of this item are not now available, but the amount is reasonable because no other depreciation was claimed)			6
Total			$13,9

The above amount should, it is believed, be apportioned in the same manner as that used by the Commissioner in apportioning the deduction for obsolescence of goodwill as in 5 (c) above, as follows:

1918	12/37	$ 4,523.49
1919	24/37	9,046.98
1920	1/37	376.95
	Total as above	$13,947.42

6. The taxpayer in support of his appeal relies upon the following propositions of law:

(a) That in computing net income there shall be allowed as deductions—

(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business.

Section 214 (a) Revenue Act of 1918.

(b) That in computing net income there shall be allowed as deductions—

(8) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence.

Section 214 (a) Revenue Act of 1918.

Unamortized balance of buildings on leased ground, reverted to lessor January 16 1920.....			$7,2
Cooperage, furniture, fixtures, etc., book value.....		$13,965.03	
Less:			
Proceeds of sales originally reported as income in the year 1920.....$7,801.18			
Estimated value of office furniture retained	100.00	7,901.18	6,0
Forward, ...			$13,2
[5] Forward, ...			$13,2
Additional depreciation not charged on books (the details of this item are not now available, but the amount is reasonable because no other depreciation was claimed)			6
Total			$13,9

The above amount should, it is believed, be apportioned in the same manner as that used by the Commissioner in apportioning the deduction for obsolescence of goodwill as in 5 (c) above, as follows:

1918	12/37	$ 4,523.49
1919	24/37	9,046.98
1920	1/37	376.95
	Total as above	$13,947.42

6. The taxpayer in support of his appeal relies upon the following propositions of law:

(a) That in computing net income there shall be allowed as deductions—

(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business.

Section 214 (a) Revenue Act of 1918.

(b) That in computing net income there shall be allowed as deductions—

(8) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence.

Section 214 (a) Revenue Act of 1918.

WHEREFORE the taxpayer respectfully prays that this Board may hear and determine this appeal.

W. M. SMITH,
Counsel for Taxpayer.
Address: 505 Transportation Bldg.,
Washington, D. C.

[6] TREASURY DEPARTMENT.
WASHINGTON.

Office of
Commissioner of Internal Revenue
IT:PA:4.
GWF:406

September 4, 1925.

Mr. LeRoy Schlesinger,
Room 612 Flood Building,
San Francisco, California.

Sir:

Your claim for the abatement of $414.99 individual income tax for the year 1918 has been examined and will be rejected for the reasons stated in the attached statement.

In accordance with the provisions of Section 279(b) of the Revenue Act of 1924, you are allowed 60 days from the date of this letter within which to file an appeal to the Board of Tax Appeals contesting in whole or in part the correctness of this determination.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the enclosed agreement consenting to the assessment of the deficiency and forward it to the Com-

missioner of Internal Revenue, Washington, D. C., for the attention IT:PA:4:GWF:406. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,
D. H. BLAIR,
Commissioner.
By (Signed) J. G. BRIGHT,
Deputy Commissioner.

Enclosure:
Statements
Agreement—Form B.

[7] STATEMENT.

IT:PA:4.
GWF:406.

In re: Mr. LeRoy Schlesinger,
Room 612 Flood Building,
San Francisco, California.
1918.
Deficiency in Tax—$414.99

Your claim is based on the appeal submitted by Schlesinger and Bender which was pending in the office of the Solicitor of Internal Revenue.

You are advised that in the audit of the partnership return of Schlesinger and Bender on which the adjustment of $414.99 was based a deduction for obsolescence was disallowed for the reason that the property in question had been continued in use. finally sold in 1920, and no information was furnished to substantiate the deduction claimed for

obsolescence. The partnership was given every opportunity to substantiate the deduction claimed but has failed to do so.

It is accordingly held by this office that the action taken by the Income Tax Unit in disallowing the deduction claimed should be sustained and your claim will accordingly be rejected.

[8] State of California,
City and County of San Francisco.

LeRoy Schlesinger, being duly sworn, says that he is the taxpayer mentioned in the foregoing petition; that he has read the said petition, or had the same read to him, and is familiar with the statements therein contained, and that the facts therein stated are true, except such facts as are stated to be upon information and belief, and these facts he believes to be true.

LeROY SCHLESINGER.

Sworn before me this 6th day of October, 1925.

[Seal] L. P. LOVELAND,
Notary Public in and for the City and County of San Francisco, State of California.

Now, March 1, 1930, the foregoing petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[9] Filed Nov. 2, 1925. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 8036.

Appeal of LeROY SCHLESINGER, San Francisco, California.

ANSWER.

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

(1) Admits the allegations contained in paragraphs 1, 2 and 3; except that he denies that the taxes in controversy are income taxes for the years 1919 and 1920 and avers that the deficiency letter from which the appeal is taken relates only to the year 1918.

(2) Denies that any error was made in the determination of the deficiency in tax set out in the letter of September 4, 1925.

(3) Admits that in its tax return for the period ending December 31, 1918, the copartnership claimed as a deduction the sum of $21,848.60 as exhaustion, wear and tear of tangible properties.

(4) Admits the allegations contained in subparagraphs (b) and (c) of paragraph 5.

(5) Admits that the deduction of $21,848.60 claimed by the taxpayer in its return for the period ending December 31, 1918 was erroneous; denies

that the correct amount is $13,947.42 and further denies that the taxpayer is entitled to any deduction on account of obsolescence of its tangible property.

(6) Denies, generally and specifically, each and every allegation in the taxpayer's petition contained not hereinbefore admitted, qualified or denied.

[10] PROPOSITION OF LAW.

The taxpayer is not entitled to any deduction on account of the obsolescence of its tangible property for the reason that no obsolescence was sustained.

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.

Of Counsel:

M. N. FISHER,
Special Attorney,
Bureau of Internal Revenue.

Now, March 1, 1930, the foregoing answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[11] Recd. Apr. 7, 1927. United States Board of Tax Appeals.

Filed Apr. 8, 1927.

United States Board of Tax Appeals.

DOCKET No. 8036.

LeROY SCHLESINGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

AMENDED ANSWER.

The Commissioner of Internal Revenue by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragrph 2 of the petition.

3. Admits that claims for abatement have been filed in respect to assessments made for the years 1918 and 1919, but denies the remaining allegations contained in paragraph 3 of the petition; and, alleges that the taxes in controversy are income taxes for the calendar year 1918 and is in the amount of $2,044.18.

4. (a) Denies that the Commissioner erred in

the determination of the taxes as alleged in subdivision (a) of paragraph 4 of the petition, but alleges that the Commissioner erred in not including in the petitioner's income for the year 1918, $5,709.70 and for the year 1919, $11,419.39, said amounts being the petitioner's distributive interest in $52,814.70 deducted for the taxable years 1918 and 1919 by Schlesinger and Bender as obsolescence of goodwill.

5. (a) Admits that in its tax return for the period ending December 31, 1918, the copartnership claimed as a deduction the sum of $21,848.60, as exhaustion, wear and tear of tangible properties.

5. (b) Admits the allegations contained in subdivision (b) of paragraph 5 of the petition.

[12] Docket No. 8036.

5. (c) Admits the allegations contained in subdivision (c) of paragraph 5 of the petition, and alleges that the obsolescence of goodwill amounting to $52,814.70 deducted by Schlesinger and Bender as alleged in subdivision (c) of paragraph 5 of the petition is not an allowable deduction to said copartnership.

5. (d) Admits that the deduction of $21,848.60 claimed by the copartnership in its return for the period ending December 31, 1918, was erroneous. Denies that the correct amount deductible is $13,947.42, and further denies that the copartnership is entitled to any deduction for obsolescence of its tangible property.

Denies generally and specifically each and every other allegation contained in the petition of the above-named taxpayer not hereinbefore expressly admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal be denied.

A. W. GREGG,
General Counsel,
Attorney for Commissioner of Internal Revenue.

Of Counsel:

THOMAS M. MATHER,
Special Attorney,
Bureau of Internal Revenue.

Now, March 1, 1930, the foregoing Amended Answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[13] Filed at Hearing May 4, 1927. U. S. Board of Tax Appeals. Div. —— Docket 8036.

United States Board of Tax Appeals.

DOCKET No. 8036.

LeROY SCHLESINGER,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AMENDMENT TO PETITION.

Leave from United States Board of Tax Appeals, first being had and obtained the petitioner in the above entitled and numbered cause, hereby files the following amendment to the petition now on file

herein, and by way of such amendment adds to and includes in said petition the following allegation:

Petitioner further alleges by way of appeal, that all of the alleged deficiencies and taxes claimed or set forth in the said deficiency letter upon which this appeal is predicated and all alleged deficiencies and taxes claimed or set forth in the answer and amend*ment* answer of the Commissioner of Internal Revenue herein, are forever barred by and under, the provisions of, and periods of limitations contained in, the *the* Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1919, the Revenue Act of 1920, the Revenue Act of 1921, the Revenue Act of 1924, and the Revenue Act of 1926, and particularly Section 277 of said last-named Act.

WHEREFORE, the petitioner respectfully prays that this Board may hear and determine his appeal.

JEROME H. BAYER,
Counsel for Petitioner.

State of California,
City and County of San Francisco.

LeRoy Schlesinger, being duly sworn, deposes and says that he is the petitioner above named; that he has read the foregoing amendment, or had the same read to him, and is familiar with the statements contained therein and that the facts stated therein are true except such facts as are stated to be upon information and belief and those facts he believes to be true.

LeROY SCHLESINGER.

Sworn to before me this 3d day of May, 1927.
[Seal] J. J. KERRIGAN,
Notary Public in and for the City and County of San Francisco.

Now, March 1, 1930, the foregoing Amendment to Petition certified from the record as a true copy.
[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[27] United States Board of Tax Appeals.

DOCKET Nos. 7455 and 8036.

LeROY SCHLESINGER,

Petitioner,

vs

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER OF REDETERMINATION.

Pursuant to the Board's findings of fact and opinion promulgated September 25, 1928,—

IT IS ORDERED AND DECIDED that there are deficiencies in tax in respect of the above-entitled petitioner of $1,529.19 for the year 1918 and $219.68 for the year 1920.

(Signed) B. H. LITTLETON,
Member, U. S. Board of Tax Appeals.

Dated Washington, D. C.
Entered: Dec. 14, 1928.

Now, March 1, 1930, the foregoing Order of Redetermination certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[28] Filed June 11, 1929.

In the United States Circuit Court of Appeals for the Ninth Circuit.

LeROY SCHLESINGER,
Petitioner and Appellant,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee.

PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes LeRoy Schlesinger, the above-designated petitioner and appellant, (hereinafter called petitioner) and files this petition for the review of the findings of fact and opinion of the United States Board of Tax Appeals in the appeal before said Board designated therein as Docket #8036, promulgated on the 25th day of September, 1928, and the decision and order of redetermination of said Board rendered and entered in said appeal on the 14th day of December, 1928, approving, redetermin-

ing and fixing deficiencies in income tax of the petitioner for the calendar year 1918 in the amount of $1,529.19, and your petitioner respectfully shows:

[29] I.

STATEMENT OF THE NATURE OF THE CONTROVERSY.

The respondent and appellee (hereinafter called respondent) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States of America.

The said petitioner and appellant (hereinafter called petitioner) made his return of Income Taxes with respect to his income for the year 1918 to the Collector of Internal Revenue at San Francisco, California, not later than March 15th, 1919.

The respondent notified petitioner by means of a sixty-day letter, of the disallowance of petitioner's abatement claim for the sum of $414.99 covering the year 1918. This abatement claim arose primarily out of the disallowance by the Commissioner of Internal Revenue of a reduction for obsolescence of the tangible assets of the partnership of Schlesinger & Bender, of which petitioner was a member. This firm was engaged in the wholesale liquor business, with its principal place of business at San Francisco, California. The premises which it occupied were leased premises. The partnership was obliged to, and did terminate its business in January, 1920, by reason of prohibition legislation, which resulted in the obsolescence both of the tangible assets and goodwill of the partnership. A

deduction for obsolescence of goodwill was allowed to said partnership by the Commissioner of Internal Revenue. A deduction for obsolescence of tangible assets was made upon the income tax return filed by the partnership for the year 1918. This deduction was disallowed by the Commissioner, as set [30] forth in said sixty-day letter to petitioner, dated September 4, 1925. From said letter petitioner took an appeal within the time and in the manner provided by law to the United States Board of Tax Appeals. This appeal was designated in the files of said Board as Docket No. 8036. Said appeal was decided by said Board adversely to said petitioner. It is the proceedings, findings of fact, opinion, decision and order of said redetermination of said Board in that appeal which petitioner now seeks to have reviewed and reversed by this Honorable Court.

The questions considered or ruled upon by said United States Board of Tax Appeals in said appeal, as well as the questions arising out of the actions, rulings, findings of fact, opinion, decision, and order of redetermination of said Board therein, are substantially as follows:

> Whether or not a form of written consent or waiver executed by a taxpayer, is effective to extend the statutory period of limitation for the assessment and/or collection of taxes, without, or before, the approval thereof by the Commissioner of Internal Revenue.
>
> Whether or not a form of written consent or waiver executed and/or filed by a taxpayer

after the expiration of the statutory period of limitation for the assessment and/or collection of taxes, is valid and effective.

Whether or not a written consent or waiver filed with the Commissioner within the statutory period of limitations, but not approved by the Commissioner until after the expiration of said statutory period, is effective.

Whether or not the Commissioner of Internal Revenue had the right to file an amended answer in said appeal, without prior notice to said petitioner, and without prior opportunity of said petitioner to be heard with respect thereto.

Whether or not the Commissioner had the right to insert in his amended answer in said appeal, [31] new matter and matter not mentioned or referred to or incorporated in his sixty-day letter to petitioner, from which letter said appeal was taken.

Whether or not said United States Board of Tax Appeals had jurisdiction to determine alleged deficiencies additional to or greater or other than the alleged deficiency set forth in the sixty-day letter of the Commissioner to petitioner, and in nowise made a part of petitioner's said appeal, and being wholly different in nature and in the facts out of which they arise from that set forth in said sixty-day letter.

Whether or not entries in books of account of said partnership and the oral testimony of

competent witnesses introduced at the hearing of said appeal by the petitioner, were sufficient, as a matter of law, to establish the value and rates of depreciation of tangible properties of said partnership for the obsolescence of which a deduction was claimed, in the absence of any offer of evidence or proof to the contrary by the Commissioner.

Whether or not the Commissioner validly and effectively asserted at or before the hearing of said appeal a claim for deficiency other or greater than or in addition to alleged deficiency set forth in said sixty-day letter.

Whether or not obsolescence of goodwill occasioned by prohibition legislation constituted an allowable deduction.

Whether or not obsolescence of tangible assets occasioned by prohibition legislation constituted an allowable deduction, and if so, whether or not said partnership was entitled to apportion the loss resulting from said obsolescence over a period beginning with the time when it first learned that it would be obliged to discontinue its business and ending with the time when said business was actually terminated by reason of said prohibition legislation.

Whether or not petitioner was entitled to a continuance of said hearing of said appeal.

The foregoing questions were decided by said United States Board of Tax Appeals adversely to petitioner, and the position of petitioner with re-

spect thereto is covered by the assignments of error hereinafter set forth.

[32] II.

DESIGNATION OF COURT OF REVIEW.

Petitioner is and was at all times herein mentioned an inhabitant of the State of California residing in the Town of Burlingame in said State, and being aggrieved by the said decision, findings of fact, opinion and order of redetermination of said Board, desires that the same be reviewed in accordance with law by the United States Circuit Court of Appeals for the Ninth Circuit.

ASSIGNMENTS OF ERROR.

Petitioner as a basis for review, assigns the following errors which he avers occurred before and upon the hearing of said cause by the United States Board of Tax Appeals and in the decision, findings of fact and opinion of said Board therein, and in the order of redetermination rendered, given and made in said cause, and upon which errors he relies to reverse said decision and order of redetermination, to wit:

(1) The said Board erred in rendering its decision for respondent herein.

(2) The said Board erred in determining that there is a deficiency in the taxes of petitioner for the year 1918 in the amount of $1,529.19, or in any amount or amounts at all, or any deficiency at all, and further erred in upholding respondent's rejection of petitioner's claim for abatement of $414.99 individual income tax for 1918.

(3) The said Board erred in allowing respondent's amended answer herein to be filed without previous notice being [33] given to the petitioner herein and in granting respondent's motion for the filing of said amended answer without previous notice to petitioner of said motion or a hearing thereof.

(4) The said Board erred in refusing to strike the amended answer of respondent herein upon motion duly made by petitioner at the hearing of said cause and in denying said motion.

(5) The said Board erred in refusing, upon motion duly made therefor by petitioner at the hearing of said cause, to strike from respondent's amended answer an allegation in Paragraph 4a thereof, which reads as follows: "alleges that the Commissioner erred in not including in petitioner's income for the year 1918, $5,709.70, and for the year 1919, $11,419.39, said amounts being the petitioner's distributive interest in $52,814.70 deducted for the taxable years 1918 and 1919 by Schlesinger & Bender as obsolescence of goodwill." The Board erred in denying said motion.

(6) The said Board erred in refusing to grant to petitioner and in denying his motion for a continuance of the hearing of said appeal.

(7) The said Board erred in refusing, upon motion duly made therefor by petitioner at the hearing of said cause, to strike from respondent's amended answer an allegation of Paragraph 5c which reads as follows: "and alleges that the obsolescence of goodwill amounting to $52,814.70 de-

ducted by Schlesinger & Bender as alleged in subdivision c of Paragraph 5 of the petition is not an allowable deduction to said copartnership." The Board erred in denying said motion.

[34] (8) The said Board erred in holding that the so-called affirmative allegations contained in respondent's amended answer were properly included and might remain therein.

(9) The said Board erred in considering obsolescence of goodwill as an issue in said appeal and in ruling that it was an issue therein and in holding that obsolescence of goodwill was made an issue of and in said appeal by the pleadings therein.

(10) The said Board erred in its failure to find or hold that petitioner was entitled to claim deduction for loss occasioned by obsolescence of the furniture, equipment and leasehold improvements of the partnership of Schlesinger & Bender, of which he was a member, and to apportion this loss over the period of eighteen and one-half months beginning with 1918 when the partnership first learned that it would be obliged to terminate the business, and ending in 1920 when the business was terminated by reason of prohibition legislation.

(11) The said Board erred in its failure to find that improvements on the leasehold of the partnership of Schlesinger & Bender had a value of $7,200.00, and that said value was entirely wiped out by complete obsolescence of said improvements upon the termination of the lease.

(12) The said Board erred in its failure to find that the value of tangible assets (exclusive of lease-

hold improvements) of the partnership of Schlesinger & Bender for which obsolescence was claimed was $13,965.03, and that as a result of said obsolescence the value was reduced to a junk [35] value of $7,801.18.

(13) The said Board erred in finding that no entries were made on the books of the partnership of Schlesinger & Bender of the sale in 1920 of its furniture and equipment. Said finding is wholly unsupported by and contrary to the evidence.

(14) The said Board erred in its failure to find that the proceeds received by the partnership of Schlesinger & Bender in 1920 from the sale of cooperage, scrap and office furniture was the sum of $7,801.18. Said cooperage, scrap and office furniture being part of the property for which a deduction for obsolescence was claimed.

(15) The said Board erred in its failure to find that the partnership of Schlesinger & Bender discontinued on or about January 16th, 1920, the use of its leasehold premises.

(16) The said Board erred in its failure to find that deduction for obsolescence of goodwill in the amount of $52,814.70 was in fact allowed to copartnership of Schlesinger & Bender by the Commissioner of Internal Revenue.

(17) The said Board erred in finding that a motion was duly granted by the Board for the filing of an amended answer in this proceeding. Said finding is wholly unsupported by and contrary to the evidence.

(18) The said Board erred in finding that at the hearing of this cause Commissioner contended for an increase of deficiency based upon the alleged affirmative allegations in the amended answer with respect to the deduction for obsolescence of goodwill. Said finding is wholly unsupported by and contrary to the evidence.

[36] (19) The said Board erred in holding that any waiver executed by petitioner for 1918 was valid and/or effectively extended the time fixed by law within which assessment could be made for that year.

(20) The said Board erred in holding that the undated income and surtax waiver of petitioner for 1918 expired March 1, 1925, and marked received September 19, 1924, effectively extended the time fixed by law within which assessments could be made for that year.

(21) The said Board erred in holding that a consent or waiver executed after statutory period of limitations has expired is valid and that taxes may be assessed within the period of such consent or waiver.

(22) The said Board erred in holding that a consent or waiver is valid and that taxes may be assessed within the period of such consent or waiver notwithstanding the fact that such waiver or consent has not been approved by the Commissioner until after the expiration of the statutory period of limitations.

(23) The said Board erred in denying the con-

tention of petitioner with respect to the issue of the statute of limitations.

(24) The said Board erred in holding that any alleged waivers or consents on behalf of said petitioner were valid and effectively extended the period fixed by law.

(25) The said Board erred in holding that the evidence was insufficient as to the value of the tangible assets on account of which obsolescence was claimed.

[37] (26) The said Board erred in holding that there was not sufficient evidence to establish how the book values of the tangible assets for which deduction for obsolescence was claimed were computed, and in holding that the method of computing said book values was necessary to be proved.

(27) The said Board erred in holding that there was no proof of costs or appropriate rates of depreciation of the tangible assets for which deduction for obsolescence was claimed.

(28) The said Board erred in its failure to hold that the amount sold or salvaged from the furniture and equipment of Schlesinger & Bender in 1920 was $7,801.18.

(29) The said Board erred in finding and holding that it had no basis upon which to determine the amount of obsolescence either of furniture and equipment and/or leasehold improvements, and in denying petitioner's contention upon that issue. Said finding is wholly unsupported by and contrary to the evidence.

(30) The said Board erred in holding that peti-

tioner was not entitled to deduct and could not deduct anything for obsolescence of tangible assets of said partnership of Schlesinger & Bender.

(31) The said Board erred in holding that the Commissioner had erred in allowing the partnership of Schlesinger & Bender a deduction for obsolescence of goodwill.

(32) The said Board erred in holding that the Commissioner did at or before the hearing of said cause effectively or at all assert a claim for an increased deficiency or for a deficiency in excess of the amount originally determined by him.

[38] (33) The said Board erred in holding that by so-called affirmative allegations in his amended answer or otherwise or at all Commissioner had effectively asserted a claim for an increased deficiency within the meaning of Section 274E of the Internal Act of 1926, or otherwise or at all.

(34) The said Board erred in finding and holding the following statements in the amended answer constituted affirmative allegations, to wit: "that the Commissioner erred in not including in the petitioner's income for the year 1918, $5,-709.70, and for the year 1919 $11,419.39, said amounts being the petitioner's distributive interest in $52,814.70 deducted for the taxable years 1918 and 1919 for obsolescence of goodwill," and "that the obsolescence of goodwill amounting to $52,-814.70 * * * is not an allowable deduction to said copartnership.

(35) The said Board erred in failing to hold that the prayer in said amended answer completely

negatived the construction of said amended answer as an assertion of a claim for affirmative relief.

(36) The said Board erred in holding that obsolescence of goodwill is not an allowable deduction from gross income.

(37) The said Board erred in holding that a sufficient claim for additional deficiency or addition in tax is made if the Commissioner affirmatively alleges error in his original determination together with facts sufficient, if proved, to result in an increase of the net income and the tax of the petitioner over that originally determined by him

[39] (38) The said Board erred in assuming jurisdiction over and in considering and determining as issues matters and items not mentioned in or made subject matter of the Commissioner's letter to petitioner and not otherwise effectively asserted at or before the hearing.

(39) The said Board erred as follows: Said Board failed and refused to allow any deduction for obsolescence of furniture and equipment of the copartnership of Schlesinger & Bender and to allow a reapportionment of this deduction over the years 1918, 1919 and 1920; and notwithstanding this fact said Board failed to allow any credit to petitioner for his distributive share of the tax paid for 1920 upon $7,801.18, reported as a profit by the copartnership of Schlesinger & Bender in the year 1920, and representing the amount received as salvage by said copartnership of said furniture and equipment.

(40) The said Board erred in its failure and refusal to allow the abatement claim of petitioner in the sum of $414.99 arising from respondent's refusal to allow deduction for obsolescence of the tangible assets of the Schlesinger & Bender partnership.

(41) The said Board erred in overruling the objection of counsel for petitioner to the question put to LeRoy Schlesinger and set forth on pages 58 and 59 of the transcript of the proceeding upon said appeal, and reading as follows: Q. And did they ever claim a deduction for the obsolescence of goodwill for prohibition purposes in those returns?

[40] Mr. BAYER.—I should like, at this time, to interpose an objection to all questions, relating to obsolescence of goodwill, and to save time, I ask that that same objection be preserved with respect to all questions with reference thereto.

Mr. VAN FOSSAN, Member.—The objection is overruled."

(42) The said Board erred in making an order of redetermination and/or decision pursuant to the Board's finding of fact and opinion promulgated September 25, 1928.

(43) The said Board erred in ordering and deciding that there is any deficiency tax or sum of money due, collectible and/or assessable from or against the above-entitled petitioner for the year 1918.

(44) The said Board erred in that its decision rendered in said appeal is contrary to and against law.

(45) The said Board erred in ordering the entry of judgment under Rule 50 pursuant to the prevailing opinion of the Board rendered in said appeal.

WHEREFORE, the above-mentioned petitioner herein prays that the United States Circuit Court of Appeals for the Ninth Circuit review the action of the said United States Board of Tax Appeals in this cause and reverse said decision and order of redetermination of said Board, and direct and order the making and entry of a decision and order by said Board in favor of the petitioner determining that there is no deficiency or increased deficiency in income taxes due, collectible and/or assessable from the petitioner for the year 1918, and that [41] there is no tax or amount at all due, collectible and/or assessable from or against said petitioner for 1918, and that said petitioner be allowed his claim in abatement for 1918 in the sum of $414.99, and that the Clerk of said Board be directed to transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit certified copies of each and all of the documents necessary and material to the presentation and consideration of the foregoing petition for review and as required by the rules of said court and by law, and for such other and further relief as may to this court appear proper in the premises.

And your petitioner will ever pray.

LeROY SCHLESINGER,
Petitioner and Appellant.
JEROME H. BAYER,

_____,

Attorneys for Petitioner and Appellant,
1225 Crocker First National Bank Building,
San Francisco, California.

[42] State of California,
City and County of San Francisco,—ss.

LeRoy Schlesinger, being first duly sworn, on oath deposes and says:

That he is the petitioner and appellant above named; that he has read the foregoing petition; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true; and that the said petition is filed in good faith.

LeROY SCHLESINGER.

Subscribed and sworn to before me this 29th day of May, 1929.

[Seal] LAURA E. HUGHES,
Notary Public in and for the City and County of San Francisco, State of California.

[43] Filed Jun. 13, 1929. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 8036.

LeROY SCHLESINGER,
Petitioner and Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee.

NOTICE.

To: Hon. C. M. Charest, General Counsel, Bureau of Internal Revenue, Washington, D. C.

You are hereby notified that the above-named petitioner this 8th day of June, 1929, filed with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision, findings of fact, opinion, and order of redetermination of said Board in the above-entitled matter. A copy of said petition for review and assignments of error as filed is attached hereto.

JEROME H. BAYER,

_____,

Attorneys for Petitioner and Appellant,
1225 Crocker First National Bank Bldg.,
San Francisco, California.

I hereby this 8 day of June, 1929, accept personal service of a copy of the petition to review and assignments of error in the above-entitled matter together with notice of the filing thereof.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue, for Respondent and Appellee.

Now, March 1, 1930, the foregoing Petition for Review and proof of service certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[44] Filed Feb. 12, 1930. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 8036 *and*

LeROY SCHLESINGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STIPULATION.

It is hereby stipulated and agreed by and between the parties in the above-entitled cause through their respective attorneys that the statement of evidence as approved by a member of the Board of Tax Appeals in the case of Leon L. Moise,

Docket No. 7453, is hereby incorporated by reference and the same shall constitute the statement of evidence in the above-entitled cause.

J. S. Y. IVINS,
Associate Counsel for Petitioner.
C. M. CHAREST.
F.
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Now, March 1, 1930, the foregoing Stipulation certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Endorsed]: No. 6182. United States Circuit Court of Appeals for the Ninth Circuit. LeRoy Schlesinger, Petitioner, vs. David Burnet, Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed July 1, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

n the United States Circuit Court of Appeals for the Ninth Circuit.

Designated in U. S. B. T. A. as Docket No. 7453.)

LEON L. MOISE,

Petitioner and Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent and Appellee.

Designated in U. S. B. T. A. as Docket No. 7454.)

GERALD F. SCHLESINGER,

Petitioner and Appellant.

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent and Appellee.

Designated in U. S. B. T. A. as Docket No. 7455.)

LeROY SCHLESINGER,

Petitioner and Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent and Appellee.

Designated in U. S. T. A. as Docket No. 8036.)

LeROY SCHLESINGER,

Petitioner and Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent and Appellee.

STIPULATION RE PRINTING OF RECORD.

It is hereby stipulated and agreed by and between the parties in the four above-entitled causes and their respective attorneys as follows:

That whereas, pursuant to the praecipes for the record served and filed in the above-entitled causes, copies duly certified of the following documents in and pertaining to the four above-entitled causes have, by the Clerk of the United States Board of Tax Appeals, been prepared, certified, transmitted and delivered to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

I. IN THE MATTER OF LEON L. MOISE vs. COMMISSIONER OF INTERNAL REVENUE, B. T. A. DOCKET No. 7453.

(a) The docket entries of all proceedings before United States Board of Tax Appeals in the above-entitled cause;

(b) All pleadings before the Board of Tax Appeals, including any exhibits attached thereto;

(c) Order for consolidation of appeals designated Docket Numbers 7453, 7454, 7455 and 8036;

(d) Findings of fact, opinion and decision of the United States Board of Tax Appeals promulgated in said cause on September 25, 1928;

(e) The order of redetermination by the United States Board of Tax Appeals in said cause;

(f) Order dated June 17, 1929, *in re* filing of amended petitions or amendments to petitions;

(g) The petition for review to United States Circuit Court of Appeals for the Ninth Circuit with

notice of filing showing service on counsel for the respondent;

(h) All orders enlarging time for preparation of the evidence and certification of the record to the United States Circuit Court of Appeals for the Ninth Circuit;

(i) Statement of the evidence;

(j) Praecipe for the record.

II. AND IN AND FOR EACH OF THE OTHER THREE OF SAID CAUSES A SUBSTANTIALLY CORRESPONDING SET OF DOCUMENTS (EXCEPT FOR CERTAIN OMISSIONS BECAUSE OF IDENTITY OR SIMILARITY.)

And whereas, a number of said documents in said four causes so prepared, certified, transmitted and delivered are either entirely or practically identical and in substance and effect the same; and,

Whereas, certain of said documents in said four causes are immaterial upon appeal,—

IT IS HEREBY STIPULATED AND AGREED that the following documents only be printed and incorporated into the printed record in and for said four causes, and that all documents in and for said four causes, save and except the following, be omitted from said printed record, and that whenever any document in and for any one of said causes is printed in said record and the corresponding documents in and for the other causes omitted from said printed record, the said document so printed shall serve as and constitute in

said printed record the corresponding document in said other causes:

(1) The docket entries of all proceedings befor United States Board of Tax Appeals in Docke No. 7453, corrected, and certified as of June 11, 193(

(2) Original petitions of appeal to the Unite States Board of Tax Appeals, including all exhibit attached thereto in Dockets No. 7453, No. 7454, N(7455 and No. 8036;

(3) Original Answers of Commissioner of In ternal Revenue in Dockets No. 7453, No. 7454, N(7455 and No. 8036;

(4) Motions for leave to file amended answer and the amended answers filed in Dockets No. 745 No. 7454, No. 7455 and No. 8036;

(5) Order for consolidation of the appeals des ignated as Dockets No. 7453, No. 7454, No. 7455 an No. 8036, said order to be printed only once and i the form appearing in Docket No. 7453;

(6) Motions to amend petitions and amendment to petitions, or amended petitions, in Dockets N(7453, No. 7454, No. 7455 and No. 8036;

(7) The findings of fact and opinion in and fo all of said four appeals, to be printed only one and in the form appearing in Docket No. 7453;

(8) Orders of redetermination of said Boar in Dockets No. 7453, No. 7454, No. 7455 and N(8036;

(9) Petitions for review to the United State Circuit Court of Appeals for the Ninth Circuit i Dockets No. 7453, No. 7454, No. 7455 and No. 803(showing notice of filing thereof and admission o service;

(10) Orders dated June 17, 1929, *re* filing of amended petitions or amendments to petitions in Dockets No. 7453 and No. 7454;

(11) Statement of evidence with certifications as it appears in Docket No. 7453, said statement of evidence to be printed only once;

(12) Stipulations *re* statement of evidence in Dockets No. 7454, No. 7455 and No. 8036;

(13) Praecipe for the Record in Docket No. 7453;

~~(14) Stipulations re correction of docket entries in Dockets No. 7453, No. 7454, No. 7455 and No. 8036;~~

(14) This stipulation.

IT IS HEREBY FURTHER STIPULATED AND AGREED that only one record shall be printed for said four causes and that said one printed record shall serve as and constitute the record in all four causes upon said four petitions for review to the United States Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER STIPULATED AND AGREED that said four causes be consolidated as to record, briefs, hearing, disposition and decision by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: June 10, 1930.

JEROME H. BAYER,
J. S. Y. IVINS,
Attorneys for Petitioners and Appellants.
C. M. CHAREST.
F.
C. M. CHAREST,
Attorney for Respondent and Appellee.

So ordered.

FRANK H. RUDKIN,
United States Circuit Judge.

Dated: San Francisco, January 29, 1931.

[Endorsed]: Stipulation Re Printing of Record. Filed Jul. 1, 1930. Paul P. O'Brien, Clerk.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LEON L. MOISE, *Petitioner,* vs. DAVID BURNET, Commissioner of Internal Revenue, *Respondent.*	No. 6179
GERALD F. SCHLESINGER, *Petitioner,* vs. DAVID BURNET, Commissioner of Internal Revenue, *Respondent.*	No. 6180
LEROY SCHLESINGER, *Petitioner,* vs. DAVID BURNET, Commissioner of Internal Revenue, *Respondent.*	Nos. 6181-6182

BRIEF FOR PETITIONERS.

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IN THE

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LEROY SCHLESINGER, *Petitioner,* vs. DAVID BURNET, Commissioner of Internal Revenue, *Respondent.*	Nos. 6181-6182

BRIEF FOR PETITIONERS.

INTRODUCTION.

The four above-entitled proceedings are predicated upon petitions, filed pursuant to Sections 1001, 1002

and 1003 of the Revenue Act of 1926, for review o decisions, adverse to the taxpayers, rendered b United States Board of Tax Appeals in four cor responding cases before that tribunal. The decision by the Board were rendered on December 14th an 15th of 1928. The pending petitions for review wer filed on June 11, 1929. The taxpayers are all inhabi tants of the State of California.

The four cases involve substantially the same fact and issues. Accordingly they were consolidated fo hearing and decision by the Board (Tr. p. 21). On set of findings was made and one opinion rendered b the Board for all four cases. Correspondingly th four proceedings for review now pending before thi Court have been duly consolidated (Tr. p. 223). I consequence this brief is filed in support of the fou petitions for review.

PRELIMINARY STATEMENT OF FACTS.

For many years and continuously to January 192 the three taxpayers above-named were jointly engage in a wholesale liquor business known as "Schlesinge & Bender." This business was conducted through corporate form of organization until June, 1918, a which time the corporation was dissolved. Thereupon to-wit: on July 1, 1918, the aforesaid three taxpayer formed a partnership, which took over the busines of the corporation and maintained the same unti January, 1920, at which time they were obliged to an did terminate the business by reason of Prohibitio Legislation. This resulted in obsolescence of th

ngible assets and good will of the partnership busi-
ess with heavy losses to the taxpayers (Tr. pp.
2-76).

In the latter half of 1925, the Commissioner of
nternal Revenue mailed four deficiency letters: one
Leon L. Moise covering the years 1918, 1919 and
920 and determining a deficiency in the sum of
5,032.29; one to Gerald F. Schlesinger covering the
ears 1918 and 1919 and determining a deficiency in
ie sum of $4,657.96, and two to LeRoy Schlesinger,
which one, involving the year 1920, determined a
eficiency in the sum of $153.08, and the other, in-
olving the year 1918, rejected a claim in abatement
or $414.99. From each of these four letters the tax-
ayer receiving it filed an appeal with United States
oard of Tax Appeals, claiming error on the part of
ie Commissioner with respect to such portion of the
leged deficiency as arose from disallowance of a
eduction for obsolescence of tangible assets of the
artnership business, and alleging that all taxes and
eficiencies for the years in question were forever
arred by the statutes of limitation applicable thereto.

An answer and an amended answer were filed by
ie Commissioner in each of the four appeals. The
our proceedings were tried together before the Board
n May 4, 1927. The decision of the Board, promul-
ated on September 25, 1928, was adverse to the tax-
ayers on all points. Not only did it uphold in en-
rety the deficiencies claimed in the sixty-day letters
om which the appeals were taken, but, in addition,
etermined greatly increased deficiencies (Tr. pp. 25-
3). In December, 1928, the Board made and entered

an Order of Redetermination under Rule 50 in each of the four cases, fixing the total deficiency of Leon L. Moise in the sum of $9,633.30, fixing the total of deficiency of Gerald F. Schlesinger in the sum of $9,031.54, and fixing the total deficiency of LeRoy Schlesinger in the sum of $1,748.87 (Tr. pp. 39, 124, 163, 199).

In the cause of conciseness, we shall reserve additional statement of facts for that portion of the brief devoted to the argument.

QUESTIONS INVOLVED.

The principal questions involved in these proceedings (and to which all other questions are subsidiary) are the following:

(1) *Whether the Board erred in holding that the Commissioner, within the meaning of Section 274 (c) of the Revenue Act of 1926, asserted claims for deficiencies greater in amount than those specified in the sixty-day deficiency letters, and whether the Board erred in exercising jurisdiction to determine and in determining deficiencies greater in amount than those specified in the deficiency letters?*

(2) *Whether the Board erred in holding that the taxes for the years in controversy were not barred by the statutes of limitations, and particularly, whether the Board erred in not holding that the additional deficiencies determined by the Board and not claimed or mentioned in the deficiency letters were forever barred by the statutes of limitations?*

(3) *Whether the Board erred in deciding that petitioners were not entitled to a deduction for loss resulting from obsolescence of the tangible assets of the partnership business occasioned by Prohibition Legislation?*

(4) *Whether the Board erred in holding that the petitioners were not entitled to a deduction for loss resulting from obsolescence of the good will of the partnership business occasioned by Prohibition Legislation?*

SPECIFICATION OF ERRORS.

The assignments of errors set forth in the petitions r review are substantially the same in all four proedings. They are very numerous. Many of them, wever, are merely particularized and specific statents of the elements comprising other and more neral assignments. We believe that it will suffiently serve the present purpose to enumerate in this ief only the more general assignments. These are follows:

(1) *The Board erred in rendering its decision for respondent and in determining deficiencies in the taxes of Petitioners for the years 1918, 1919 and/or 1920.*

(2) *The Board erred in making Orders of Redetermination and/or decisions pursuant to its findings of fact and opinion promulgated September 25, 1928.*

(3) *The Board erred in holding that the Commissioner did at or before the hearing of said causes assert any claim or claims for any increased deficiency or deficiencies or for any de-*

ficiency or deficiencies in excess of the amounts specified in the deficiency letters.

(4) *The Board erred in holding that by so-called affirmative allegations in his amended answers or otherwise or at all, the Commissioner had asserted claims for increased deficiencies within the meaning of Section 274 (e) of the Revenue Act of 1926, or otherwise or at all.*

(5) *The Board erred in assuming jurisdiction over and in considering and determining as issues matters and items not mentioned in or made subject matter of the Commissioner's letters to petitioners and not otherwise asserted as claims at or before the hearing.*

(6) *The Board erred in holding that the so-called affirmative allegations contained in the amended answers of Respondent were properly included and might remain therein.*

(7) *The Board erred in denying the contention of petitioners with respect to the issue of the statutes of limitations.*

(8) *The Board erred in failing to hold that even if the so-called affirmative allegations contained in the amended answers filed in April, 1927, had constituted assertions of claims for additional deficiencies, such claims for additional deficiencies were nevertheless forever barred by reason of the expiration prior thereto of the statutory period of limitations.*

(9) *The Board erred in its failure to find or hold that Petitioners were entitled to claim deduction for loss occasioned by obsolescence of furniture, equipment, and leasehold improvements of the partnership business and to apportion this loss over the period of eighteen and one-half*

months, beginning with 1918 when the partnership first learned that it would be obliged to terminate the business, and ending in 1920 when the business was terminated by reason of Prohibition Legislation.

(10) *The Board erred in holding that the evidence was insufficient as to the value of the tangible assets of the partnership business with respect to which a deduction for obsolescence was claimed.*

(11) *The Board erred in finding and holding that it had no basis upon which to determine the amount of obsolescence either of furniture and equipment and/or leasehold improvements, and in denying Petitioners' contention upon that issue; said finding being wholly unsupported by and contrary to the evidence.*

(12) *The Board erred in holding that petitioners were not entitled to deduct anything for loss occasioned by obsolescence of the tangible assets of their partnership business on account of Prohibition Legislation.*

(13) *The Board erred in holding that there was no proof of costs or appropriate rates of depreciation of the tangible assets for which deduction for obsolescence was claimed.*

(14) *The Board erred in holding that obsolescence of good will is not an allowable deduction from gross income, and in holding that the Commissioner had erred in allowing the partnership a deduction for obsolescence of good will occasioned by Prohibition Legislation.*

ARGUMENT.

I.

NO CLAIM FOR DEFICIENCIES GREATER IN AMOUNT THAN THOSE SPECIFIED IN THE SIXTY-DAY LETTERS WAS ASSERTED BY THE COMMISSIONER AT OR BEFORE THE HEARING WITHIN THE MEANING OF SECTION 274 (e) OF THE 1926 ACT. THE BOARD HAD NO JURISDICTION TO DETERMINE ADDITIONAL DEFICIENCIES.

(a) No Assertion of Claims.

Before the enactment of the Revenue Act of 1926, no authority was vested either in the Commissioner or the Board, where a deficiency letter had been mailed to the taxpayer covering a certain year, to determine any additional deficiency for the same taxable year; except, however, that the Commissioner might mail an additional deficiency letter from which a separate appeal to the Board might be taken by the taxpayer. In the cases now under consideration, the deficiency letters were mailed and the appeals therefrom to the Board were filed in the year 1925, and prior to the enactment of the 1926 Act (Tr. pp. 10, 113, 154, 190). No deficiency letters other than those upon which the appeals to the Board were predicated were ever mailed to the taxpayers with respect to the taxable years in controversy. Therefore, under the law as it existed up to the effective date of the 1926 Act, neither the Commissioner nor the Board had any authority to increase the deficiencies for the years in controversy over the amounts specified in the sixty-day letters sent to the taxpayers.

Let us now examine the Revenue Act of 1926. The only section of this Act from which the Board could

ope to draw authority to determine additional deficiencies is Section 274. The subdivisions of this section expressly relate to deficiencies in respect to taxes mposed by the 1926 Act and to letters of deficiency nailed after the enactment of the 1926 Act. Unless y other portions of the 1926 Act this section is clearly nade retroactive to the extent of applying to taxes mposed by prior Revenue Acts and to deficiency etters mailed prior to the enactment of the 1926 Act nd to Board appeals therefrom, there was no authorty that could be vested in the Board even under the 926 Act to determine in these cases deficiencies reater in amount than those specified in the deciency letters. But let us presently assume for the ake of argument that Section 274 of the 1926 Act has uch retroactive effect. What, if any, result follows n these cases from such an assumption?

Subdivision (f) of Section 274 of the 1926 Act provides that

> "If after the enactment of this Act the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subdivision (a), and the taxpayer files a petition with the Board within the time prescribed in such subdivision, the Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year, except in the case of fraud, and except as provided in subdivision (e) of this section or in subdivision (c) of section 279."

The exceptions reserved by subdivision (f) "in he case of fraud" and "in subdivision (c) of Section 79" (relating to jeopardy assessments) have no earing upon the present proceedings. The remaining

exception reserved is subdivision (e) of Section 274, which reads as follows:

> "The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed, *if claim therefore is asserted by the Commissioner at or before the hearing or a rehearing*" (Italics ours).

Thus it is obvious that under the 1926 Act the Commissioner is limited to one deficiency letter for any taxable year, and the Board has no jurisdiction to determine a deficiency in excess of the amount specified in the sixty-day letter upon which the appeal is predicated, except where the Commissioner asserts a claim for such additional deficiency at or before the hearing.

No deficiency letters were ever mailed to the petitioners for the years in controversy, except those upon which the appeals to the Board were based. Each of those letters specified the amount of deficiency determined by the Commissioner. No claim was ever made by the Commissioner for deficiencies in excess of the amounts specified in the deficiency letters. Nevertheless the Board in its Orders of Redetermination determined deficiencies greatly in excess of the amounts specified in the deficiency letters, basing its action in this behalf upon a disallowance of a deduction for obsolescence of good will of the partnership. This deduction had been allowed by the Commissioner. It was not involved nor made an issue either in the

leficiency letters or in the petitions of appeal. The Board, in rendering its opinion, attempted to justify ts position in thus having determined greatly in- reased deficiencies, by contending that certain de- ensive allegations contained in the amended answers mounted to the assertion of a claim for additional leficiencies within the meaning of Section 274 (e) of he 1926 Act.

With respect to these defensive allegations relied on y the Board, the amended answer filed in the case f Leon L. Moise (No. 6179) is typical. The cor- esponding pleadings in the other three cases vary rom it practically only as to years and amounts. 'hese allegations, as they appear in the amended nswer filed in the Leon L. Moise case, read as follows:

> "4. (a) * * * alleges that the Commissioner erred by not including in the petitioner's income for the year 1918, $5,709.70, for the year 1919, $11,419.39, and for the year 1920, $475.60, said amounts being the petitioner's distributive interest in $52,814.70, deducted for the taxable years 1918, 1919, and 1920, by Schlesinger and Bender as obsolescence of goodwill" (Tr. pp. 16, 17).
>
> * * * * * * *
>
> "5. (c) * * * alleges that the obsolescence of goodwill amounting to $52,814.70 deducted by Schlesinger and Bender as alleged in subdivision (c) of paragraph 5 of the petition is not an allowable deduction of said copartnership." (Tr. p. 17).

The prayer at the conclusion of each of the amended nswers reads as follows: "Wherefore, it is prayed hat the appeal be denied."

We respectfully submit that it is obvious that purely defensive allegations in the form quoted above, incorporated in the body of an amended answer and followed by a prayer completely negativing any implication of a demand for affirmative relief, certainly do not constitute the assertion of a claim which, under the provisions of Section 274 (e) of the 1926 Act, was the mandatory predicate for the determination of additional deficiency and the indispensable prerequisite to vesting the Board with jurisdiction to determine additional deficiency. Such determination was not something which the Board might perfunctorily accomplish upon its own motion. Under the explicit terms of Section 274 (e) of the 1926 Act, the Board had no jurisdiction whatsoever to determine an additional deficiency *unless a claim therefor was asserted by the Commissioner at or before the hearing.* Under the statute the assertion of a claim was no mere perfunctory gesture. It was expressly conceived as an instrument upon which depended a vastly extended jurisdiction of the Board and from which might flow consequences of far-reaching import to the taxpayer.

Since Section 274 (e), requiring the assertion of a claim for additional deficiency, was enacted contemporaneously with Section 274 (f), which prohibits the Commissioner from mailing further deficiency letters for the same taxable year where the taxpayer has appealed to the Board from a deficiency letter sent, it is obvious that Congress conceived the assertion of a claim under Section 274 (e) as a substitute for the costly procedure of mailing successive deficiency letters for the same year, each of which might become

ıe basis of a separate appeal to the Board. In other ords, the claim under Section 274 (e) is a device alculated to avoid a multiplicity of proceedings be- ore the Board by serving the function previously per- ormed by the cumbersome procedure of successive eficiency letters. The successive deficiency letters ould have been definite in the assertion of demand nd specific in the statement of amount. It was the bvious intention of Congress, we submit, that a claim nder Section 274 (e) should have the same dignity s the successive deficiency letters formerly resorted o, or that at least it should be what the statute esignates—a *claim asserted* by the Commissioner. In ther words, a claim under Section 274 (e) must be ıe affirmative expression of a demand and not merely passive and defensive confession by the Commis- oner of his past error, followed by a prayer which ompletely negatives the suggestion of a claim for dditional deficiency.

The allegations relied on by the Board assert *no aim for anything.* They make *no demand.* They pecify *no amounts of tax.* They merely allege defen- vely that the Commissioner erred by not including ı the income of Petitioners the amount deducted by ıe partnership as obsolescence of good will and pro- aim the legal conclusion that the obsolescence of good ill deducted by the partnership was not an allowable eduction. Nowhere in the amended answers is it ated that in consequence of the professed error lleged and the conclusion of law proclaimed the ommissioner prays for or elects to demand a deter- ination of additional deficiency. Thus the allega-

tions relied upon by the Board are purely defensive matter. They are followed in each case by a prayer which merely requests *"that the appeal be denied"* (Tr. p. 18). The purpose of the appeals was to extinguish the deficiencies claimed in the deficiency letters. The denial of the appeals would simply mean the overruling of the taxpayers' objection to the deficiencies asserted in the letters and a ratification and affirmance of those deficiencies. This and *nothing more* was asked for in the amended answers.

In the case of *United States v. Sloan Shipyards Corporation*, 270 Fed. 613, 617, pertinent by way of analogy to the present proceedings, the Court said in part:

> "The relief demanded is gauged by the prayer. This gives the defendants such precise information as to the judgment demanded, if default is made, so they may be able to decide whether or not to defend. Section 258, Code Wash.; Rush v. Brown, 101 Mo. 586, 14 S. W. 735; Arrington v. Liscom, 34 Cal. 375, 94 Am. Dec. 722; Noonan v. Numan, 76 Cal. 44 at page 49, 18 Pac. 98. There is no prayer for judgment to determine the amount and for impressing the claim upon the property as a lien and for an order of sale. The action, stripped of all of the verbiage except the essentials necessary upon the declared contract leaves the action as one at common law upon simple contract, and under all of the authorities this court is without jurisdiction to seize the property and sell it and distribute the proceeds through a receivership, nor can it proceed otherwise because no other relief is demanded. Notwithstanding the pleading is denominated a bill in equity, the contents determine its relation."

We quote the following from the case of *Hurley-Mason Co. v. The United States,* 60 Court of Claims Reports, 764:

> "On the 11th day of May, 1925, it was ordered by the court that the defendant's motion for leave to file a counterclaim be allowed. * * *
>
> There was presented but not filed what purports to be defendant's answer and counterclaim. Attention is called to this alleged counterclaim. * * * A counterclaim should state definitely the claim which the Government makes against the plaintiff, and a report made by the Accounting Office can not be attached as part of the counterclaim."

In the present cases, no demand for deficiencies additional to those specified in the 60-day letters was ever made in any part of any document, or at the hearing, or in any manner, at any time or at all. To give to the defensive allegations of the amended answers the force of claims for additional deficiencies within the meaning of Section 274 (e) of the 1926 Act, would in effect be giving to the Board the jurisdiction to determine additional deficiencies upon its own motion, whenever anything in the cases before it would suggest to its mind a possible basis for additional deficiencies. This would in effect nullify the safeguard established by Section 274 (e) in requiring an assertion by the Commissioner of a claim for additional deficiency.

What lends further support to the contention of petitioners that no claim for additional deficiency was asserted by the Commissioner in his amended answers is the following revelatory data:

In the case of Leon L. Moise (No. 6179) the tota amount of deficiency specified in the deficiency lette was $5,032.29. In the amended answer, relied on b the Board as the assertion of a claim for additiona deficiency, the amount of taxes alleged to be in con troversy is $5,980.77 (Tr. pp. 10, 16). The relativel negligible difference between these two amounts, to wit: the sum of $948.48, is obviously the result of mere mathematical recomputation. On the other hand the Order of Redetermination (Tr. p. 39), based upo the opinion of the Board and adding to the income o the taxpayer for the years in question his distributiv share of the amount deducted by the partnership fo obsolescence of good will, determined a deficiency i the aggregate amount of $9,633.30, thus fixing th total deficiency in a sum of $3,652.53 in excess of th amount specified in the amended answer. This sur of $3,652.53 clearly covered the additional deficienc resulting from a disallowance of a deduction fo obsolescence of good will and was not demanded specified or included in the amended answer.

In the case of Gerald F. Schlesinger (No. 6180) the total amount of deficiency specified in the de ficiency letter was $4,657.96. In the amended answe relied on by the Board as the assertion of a claim fo additional deficiency, the amount of taxes alleged to b in controversy is $5,532.03 (Tr. pp. 113, 119). Th relatively negligible difference between these tw amounts, to-wit: the sum of $874.07, is obviously th result of a mere mathematical recomputation. On th other hand, the Order of Redetermination (Tr. p 124), based upon the opinion of the Board and addin

o the income of the taxpayer for the years in question is distributive share of the amount deducted by the partnership for obsolescence of good will, determined deficiency in the aggregate amount of $9,031.54, thus ixing the total deficiency in a sum $3,499.51 in excess f the amount specified in the amended answer. This um of $3,499.51 clearly covered the additional deiciency resulting from a disallowance of a deduction or obsolescence of goodwill and was not demanded, pecified or included in the amended answer.

It is obvious, we submit, from the foregoing that he amended answers did not assert or contemplate a laim for additional deficiencies resulting from disllowance of a deduction for obsolescence of goodwill.

It must also be remembered that the additional leficiencies determined by the Board did not involve nere arithmetical corrections or recomputations. They esulted from an injection into the cases by the Board of entirely new and different subject matter ot raised either by the deficiency letters or the petiions of appeal.

The contention of petitioners that no claim for dditional deficiencies was asserted by the Commisioner has been clearly and strongly expressed in the lissent of Member Van Fossan of United States Board of Tax Appeals, attached to the opinion of the Board in these cases. Member Van Fossan conducted he hearing of these cases. His dissenting opinion was oncurred in by Member Lansdon. This dissenting pinion appears on pages 35-38 of the transcript. It eads as follows:

"I am unable to agree with the prevailing opin
ion on the third issue of the case. This issue in
volved the determination of whether or not the
Commissioner has effectively asserted the claim
for the additional amount or addition to the tax
beyond that set forth in the original notices of
deficiencies.

Section 274 (e) provides:

The Board shall have jurisdiction to redeter
mine the correct amount of the deficiency even
if the amount so redetermined is greater than
the amount of the deficiency, notice of which has
been mailed to the taxpayer, and to determine
whether any penalty, additional amount or addi
tion to the tax should be assessed, *if claim* there
for *is asserted* by the Commissioner at or before
the hearing or a rehearing. (italics ours)

As I read this section, the assertion of a claim
for the additional amount or addition to the tax
is a prerequisite to the finding by the Board of
such additional amount. There are sound con
siderations of justice and fairness back of such a
provision. Petitioner, upon receipt of a notice of
a specific deficiency, prepares his petition in re
liance on the representations as to the Govern
ment's contentions set forth in the notice. His
petition is specifically addressed to those conten
tions and his preparations to contest the deficiency
are confined thereto. Section 274 (f) specifically
forbids, in cases subsequently arising, the deter
mination of an additional deficiency except in
case of fraud or as provided in Section 274 (e)
supra, or in case of a jeopardy assessment under
Section 279 (c). By this prohibition Congress
has indicated its disposition to protect the tax
payer from repeated deficiency notices covering

the same year or from uncertainty in the issues which he is called on to meet. If the Government proposes a greater deficiency under section 274 (e), I believe the taxpayer is entitled to demand that the statute be strictly complied with and that it be construed strictly against the Government. He should not be left to infer the asserting of a claim from the general tenor of affirmative allegations of the amended answer.

In the proceedings under consideration the Commissioner has not asked directly for affirmative relief from his alleged error. He made no motion to increase the deficiency appealed from. Upon permission to amend the answers he incorporated affirmative allegations that he had erroneously allowed obsolescence. The prayer of his answer is that the proceedings be dismissed. He now asks us to hold that this allegation of error on his part constitutes the assertion of a claim for additional tax under the statute. With this I cannot agree. In such a situation the taxpayer is entitled to shield himself behind every defense the law affords. The law has provided that a claim shall be asserted for the additional amount of tax. Considering the purpose and language of the statute this provision would seem to require an affirmative act of assertion. Nothing so vital to the rights of a taxpayer as the finding of a greater deficiency should be left to implication. The proper assertion of a claim is not a difficult task if directly essayed. A motion could have been made at any time during the hearing. On the other hand, to infer or imply the assertion of a claim in the instant cases will open the door to loose pleadings and place on the Board in other cases the burden of interpreting the mind of the Commissioner. The statute provides a simple

procedure, and having failed to avail himself thereof, the Commissioner has no basis for complaint.

In my opinion respondent has not effectively or properly asserted a claim for the additional amount or addition to the tax as required by law."

(b) Section 274 (e) of the 1926 Act is Not Applicable to These Cases, and the Board Had No Authority to Increase the Deficiencies.

The foregoing discussion has been based upon the assumption, made for the purpose of argument, that Section 274 (e) of the 1926 Act was applicable to the present cases. We respectfully submit, however, that a reading of the Revenue Act of 1926 shows that Section 274 (e) was not retroactive in its effect and did not apply in cases, like the present ones, where deficiency letters had been mailed and appeals therefrom commenced before the effective date of the 1926 Act.

It is Section 274 (e) alone which could under any circumstances authorize the Board, in any case before it, to determine a deficiency in excess of the amount specified in the deficiency letter upon which that case is based, and even then, only in the event that a claim for such additional deficiency is asserted by the Commissioner at or before the hearing. Section 274 and the subdivisions thereof are expressly made applicable to deficiencies in the taxes imposed by the 1926 Act and to deficiency letters mailed after the enactment of the 1926 Act and to proceedings growing out of such letters.

Among the provisions of the 1926 Act attempting in certain respects to make that Act retroactive in effect,

the only ones, we believe, that are at all applicable to the present cases are subdivisions (a) and (b) of Section 283.

Subdivision (b) of Section 283 provides that, in the case of appeals to the Board commenced before and pending at the time of the enactment of the 1926 Act, "the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the Courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section, except" in certain circumstances not applicable to the present cases. This subdivision merely relates to the situation of the parties and the Board *within and with respect to a pending appeal.* It does not purport to affect the right of the Commissioner to send out successive deficiency letters for the same taxable year and to limit him to the assertion of a claim for additional deficiencies at or before the Board hearing. It refers us for fuller data upon its own subject matter to Section 283 (a). And Section 283 (a) provides that in the case of a determination of tax provided for in that section and specified in a deficiency notice sent by registered mail, the amount of tax computed and specified in such deficiency notice "shall be assessed, collected and paid in the same manner and subject to the same provisions and limitations * * * as in the case of a deficiency in the tax imposed by this title * * *." "The case of a deficiency in the tax imposed by this title" is probably referable to Section 274 of the 1926 Act. But Section 283 (a), in referring to

Section 274 for the purpose of establishing the manner of assessment, collection and payment of a specific tax covered by a particular deficiency notice mailed to the taxpayer, obviously does not incorporate by reference the provision of Section 274 (f), which prohibits, in the case of future determinations of deficiency, the mailing of more than one deficiency letter for the same taxable year, or the provision of Section 274 (e), which prescribes the assertion of a claim at or before the hearing as the sole means of determining an additional deficiency. It is a well established rule that in the construction of statutes they will not be given a retroactive effect unless the purpose to give them such effect is clearly and explicitly expressed and beyond dispute. It has been frequently held that the presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other.

Russell v. United States, 278 U. S. 181-188, 73 L. Ed. 255, 256;

United States v. Whyel, 28 Fed. (2d) 30, 32, (Circuit Court of Appeals, Third Circuit);

Clinton Iron & Steel Co. v. Heiner, 30 Fed. (2d) 542;

United States F. & G. Co. v. U. S. Use of S. W. Co., 209 U. S. 306, 52 L. Ed. 804, 807.

If in the course of construing such a statute uncertainties appear they must be resolved in favor of the taxpayer. In the case of *United States v. Burden, Smith & Co.,* 33 Fed. (2d) 229 (Circuit Court of Appeals, Fifth Circuit), the Court said:

"Taxing statutes are to be interpreted liberally in favor of the taxpayer."

We respectfully submit that a reading of the subdivisions of Sections 274 and 283 of the 1926 Act will show that Section 274 (e) was not made or intended to be retroactive in effect so as to be applicable to the present cases and that therefore the Board erred in exercising jurisdiction to determine additional deficiencies. No additional deficiency letters were mailed to the petitioners. In the present cases such additional deficiency letters would, we submit, have constituted the only means whereby additional deficiencies could have been claimed for the years involved. We respectfully urge that under the construction of the statute to which the taxpayers are entitled, as aforesaid, Section 274 (e) of the 1926 Act was not applicable to the present cases.

II.

STATUTES OF LIMITATIONS.

(a) The Additional Deficiencies Determined by the Board Were Forever Barred and Liability Therefor Extinguished Long Before the Filing of the Amended Answers Which the Board Construed as the Assertion of a Claim Within the Meaning of Section 274 (e) of the 1926 Act.

With respect to Leon L. Moise, the proceedings before the Board involved the years 1918, 1919, and 1920. His return for 1918 was filed not later than March 15, 1919 (Tr. pp. 27-28). Therefore, without reference to waivers or any purported suspension of the statute of limitations, the statutory period for that year expired on March 15, 1924. The last waiver

executed by Leon L. Moise for the year 1918 expired on December 31, 1925 (Tr. p. 86). The return of Leon L. Moise for the year 1919 was filed not later than March 15, 1920 (Tr. p. 28). Therefore, his income taxes for the year 1919, without regard to waivers or any purported suspension of the statute of limitations, became barred on March 15, 1925. The last waiver executed by Leon L. Moise for the year 1919 expired on December 31, 1925 (Tr. p. 100). The income tax return of Leon L. Moise for 1920 was filed on April 7, 1921 (Tr. p. 84). Therefore, his income taxes for the year 1920, apart from waivers or any purported suspension of the statute of limitations, became barred on April 7, 1926. There is no evidence of any waivers having been given by Leon L. Moise for the year 1920.

With respect to Gerald F. Schlesinger, the proceedings before the Board involved the years 1918 and 1919. His income tax return for the year 1918 was filed not later than March 22, 1919 (Tr. p. 28). Therefore, his income taxes for 1918, without reference to waivers or any purported suspension of the statute of limitations, became barred on March 22, 1924. The last waiver executed by Gerald F. Schlesinger for the year 1918 expired on December 31, 1925 (Tr. pp. 90-91). The income tax return of Gerald F. Schlesinger for the year 1919 was filed on March 15, 1920 (Tr. p. 28). Therefore, his income taxes for the year 1919, irrespective of waivers or any purported suspension of the statute of limitations, became barred on March 15, 1925. The last waiver executed by Gerald F. Schlesinger for the year 1919 expired on December 31, 1925 (Tr. pp. 92-93).

With reference to LeRoy Schlesinger, the proceedings before the Board involved the years 1918 and 1920. His income tax return for the year 1918 was filed not later than March 15, 1919 (Tr. p. 29). Therefore, his income taxes for the year 1918, without regard to waivers or any purported suspension of the statute of limitations, became barred on March 15, 1924. The last waiver executed by LeRoy Schlesinger for the year 1918 expired on March 1, 1925 (Tr. pp. 97-99). His income tax return for the year 1920 was filed on April 6, 1921 (Tr. pp. 83-84). Therefore, his income taxes for the year 1920, without regard to waivers or any purported suspension of the statute of limitations, became barred on April 6, 1926. The evidence shows no waivers of LeRoy Schlesinger for the year 1920.

The Revenue Act of 1926 became effective on February 26, 1926. It is obvious from the foregoing, that, apart from a purported suspension of the statute of limitations through mailing of deficiency letters and pendency of Board appeals therefrom, the taxes of Leon L. Moise for the years 1918 and 1919, the taxes of Gerald F. Schlesinger for the years 1918 and 1919, and the taxes of LeRoy Schlesinger for the year 1918 all became barred before the 1926 Act went into effect.

The motions of the Commissioner to file the amended answers relied upon by the Board as the assertion of claims for additional deficiencies were not filed until April 7, 1927. The motions were granted on April 8, 1927. The amended answers were filed on April 8, 1927 (Tr. p. 1). It is thus obvious from the previous

paragraphs that the taxes of Leon L. Moise for the years 1918, 1919, and 1920, the taxes of Gerald F. Schlesinger for the years 1918 and 1919, and the taxes of LeRoy Schlesinger for the years 1918 and 1920, apart from any purported suspension of the statute of limitations through the mailing of deficiency letters and pendency of Board appeals therefrom, were all barred long before the motions for leave to file amended answers were made.

The Board held in its opinion (Tr. pp. 34-35) that the amended answers constituted the assertions of claims for additional deficiencies within the meaning of Section 274 (e) of the 1926 Act. It is our contention that these additional deficiencies were forever barred and all liability therefor extinguished long before those amended answers were filed. When the motions were made for leave to file the amended answers, the normal five-year periods from the filing of the returns had long since expired. The periods of the last waivers had long since expired. And the provisions of the Revenue Acts for the suspension of the statute of limitations upon the mailing of a deficiency letter and during the pendency of an appeal to the Board therefrom, obviously applied only to the deficiencies specified in the deficiency letters and had no reference whatever to additional deficiencies which were first asserted, if at all, nearly two years after the deficiency letters were mailed. It is upon this very last point that the Commissioner will probably attempt to take issue with us.

All of the deficiency letters in these cases were dated July 29, 1925, except the one sent to LeRoy Schles-

nger for the year 1918, which is dated September 4, 925 (Tr. pp. 10, 113, 154 and 190).

The waiver given by LeRoy Schlesinger for the ear 1918 expired on March 1, 1925. (By mistake it as printed twice in the Record (Tr. pp. 97-99). he deficiency letter to LeRoy Schlesinger for the ear 1918 is dated September 4, 1925—nearly six onths after the expiration date of the waiver. This eficiency letter represented a rejection of a claim in batement for $414.99 with respect to taxes for the ear 1918. Since the amended answer relied on by he Board as the assertion of a claim for additional eficiency was filed in the appeal taken to the Board rom that very same deficiency letter, and since that etter is dated over six months later than the expira- ion date of the waiver, it is obvious that the provi- ions of the Revenue Acts with respect to the suspen- ion of the statute of limitations has no application hatever; for any additional taxes were forever arred long before the mailing of the deficiency letter nd the inception of the appeal taken therefrom. herefore the determination of an additional defi- iency against LeRoy Schlesinger for the year 1918 as clearly erroneous.

With respect to Leon L. Moise, the period of the aivers for 1918 and 1919 and the normal five-year eriod of limitations for 1920, all extended beyond he date of the deficiency letter. With respect to erald F. Schlesinger, the period of waivers for 1918 nd 1919 likewise extended beyond the date of the eficiency letter. With respect to LeRoy Schlesinger, he normal five-year period of limitation for 1920

extended beyond the date of the deficiency letter. In these instances, therefore, question of the applicability of the Revenue Act provisions for suspension of the statutes of limitations pending a Board appeal to purported claims for additional deficiency first asserted during the pendency of such appeal is at least relevant. Let us therefore examine the provisions of the Revenue Acts relating to the suspension of the statutes of limitations pending Board appeals.

Section 277 (b) of the Revenue Act of 1924 provides as follows:

> "The period within which an assessment is required to be made by subdivision (a) of this section *in respect of any deficiency* shall be extended (1) by 60 days if a notice of *such* deficiency has been mailed to the taxpayer under subdivision (a) of section 274 and no appeal has been filed with the Board of Tax Appeals, or, (2) if an appeal has been filed, then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board." (italics ours)

The express language of the section just quoted clearly indicates that the extension of time for which it provides relates only to the particular and specified deficiency mentioned in and covered by the deficiency letter appealed from and to *none other*. Moreover, in the 1924 Act no provision was made for the determination of deficiencies additional to those specified in the deficiency letters, except the implication that such additional deficiencies might be demanded through additional deficiency letters, from each of which a sep-

rate appeal might be filed with the Board. The provision allowing the Commissioner to assert a claim for additional deficiency at or before the hearing of a Board appeal and giving to the Board under such circumstances the jurisdiction to determine such additional deficiency was first enacted in 1926 (see Section 274 (e) of the 1926 Act).

Let us now turn to the Revenue Act of 1926.

Section 277 (b) of the Revenue Act of 1926 provides as follows:

> "The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, *in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274)* be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter." (italics ours)

The "period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court" is covered by Section 274 (a) of the 1926 Act, which provides as follows:

> "If in the case of any taxpayer, the Commissioner determines *that there is a deficiency in respect of the tax imposed by this title*, the Commissioner is authorized to send *notice of such deficiency* to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax

> Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in sections 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until *such* notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final." (italics ours)

It is obvious, we submit, that the sections just quoted from the 1926 Act are the same in their effect as the corresponding Section 277 (b) of the 1924 Act. It was the evident purpose of the provisions of both Acts to protect both the Commissioner and the taxpayer with respect to the particular deficiency specified in the letter during the pendency of an appeal from that letter; the former being protected from a bar of the deficiency specified and the latter being protected from an assessment of that deficiency which would render his appeal abortive.

It was clearly not the motive of Congress in the 1926 Act to suspend the statute of limitations with respect to a deficiency not determined or specified in the deficiency letter but which might a year or more after the inception of the appeal be claimed for the first time by the Commissioner through an assertion at or before the hearing under Section 274 (c) of the 1926 Act. Such a grossly extended application of Section 277 (b) of the 1926 Act not only does violence to its language but actually results in inflicting a

evere penalty upon the taxpayer for instituting the ppeal. It would mean an unprecedented relaxation n one particular situation of the vigilance uniformly emanded of the Commissioner by the statutes with espect to the timely assertion of claims for defiiencies. It would mean that by merely exercising a ight of appeal, which the law has created for his rotection, the taxpayer actually revives a tax liaility otherwise long since barred.

Section 274 (e) of the 1926 Act gives the Board urisdiction to determine additional deficiencies *only* n the event that claims for such additional defiiencies are asserted by the Commissioner at or before he hearing. In other words, the Commissioner is ust as much obliged to assert a claim for *additional* eficiency as he was obliged, by way of a sixty-day etter, to assert a claim for the *original* deficiency. f the sixty-day letter is mailed too late, the deficiency laimed therein is forever barred. Correspondingly, f the assertion of a claim for additional deficiency nder Section 274 (e) is made (save for the suspenion of the statute) after the statutory period of imitation has expired, the additional deficiency thus laimed must likewise be deemed forever barred. There is nothing in the 1926 Act indicating a more enient standard of vigilance for the Commissioner n the case of asserting claims under Section 274 (e) han in the case of mailing deficiency letters. Moreover, Section 274 (f) of the 1926 Act provides that

> "If after the enactment of this Act the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subdivision (a), and the

> taxpayer files a petition with the Board within the time prescribed in such subdivision, the Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year, except in the case of fraud, and except as provided in subdivision (e) of this section or in subdivision (c) of section 279."

Prior to the effective date of the 1926 Act the Commissioner might send out successive deficiency letters covering the same taxable year, and it was in fact his habit to do so. If any of these additional letters claiming additional deficiency were mailed after the expiration of the statutory period, the additional deficiency claimed therein was barred. Under Section 274 (f), *supra,* enacted in 1926, the Commissioner became limited in normal cases to one mode of claiming deficiencies additional to those specified in the sixty-day letters from which appeals were taken, and that was *by the assertion of a claim under Section 274 (e).* Obviously, the assertion of claims under Section 274 (e) was conceived and operates as a substitute for the previous method of claiming additional deficiencies by way of successive sixty-day letters. It is clear that the older method was abolished and the new method enacted to avoid a multiplicity of proceedings before the Board. We respectfully urge that under these circumstances claims for additional deficiencies under Section 274 (e) are subject to the same limitations as claims previously asserted through successive deficiency letters, and that upon this ground alone, and apart from other reasons, the suspension of the statute of limitations provided for in Section

277 (b) of the 1926 Act should not be deemed applicable to prevent the bar of the additional deficiencies which, in this case, according to the view of the Board, were claimed by way of amended answers.

Under the 1924 Act and up to the effective date of the 1926 Act, there was no provision in the law for determining deficiencies for any year additional to those specified in a 60-day letter, either by assertion of a claim at or before the hearing of the Board appeal or in any other manner, except by the mailing of additional deficiency letters. In the present cases, the deficiency letters mailed to the taxpayers in 1925, did not specify or demand, either in facts or figures, any deficiency growing out of disallowance of a deduction for obsolescence of goodwill. And under the 1924 Act, then in effect, the appeals taken from those deficiency letters could not result in the determination of deficiencies greater than the amounts demanded in the letters. No other deficiency letters demanding additional or increased deficiencies for the same years were ever mailed to the taxpayers. In fact no other deficiency letters at all were mailed to the taxpayers. The last waivers of Gerald F. Schlesinger and Leon L. Moise for the years 1918 and 1919 expired on December 31, 1925. Therefore, under the 1924 Act, on January 1, 1926, all deficiencies for 1918 and 1919, not already claimed by deficiency letters, were barred. The 1926 Act became effective on February 26, 1926—nearly two months later. The appeals of these taxpayers were pending before the Board at that time. The 1926 Act provided, in Section 1106 (a) thereof, that "the bar of the statute of limitations against

the United States in respect of any Internal Revenue tax shall not only operate to bar the remedy but shall extinguish the liability." Can it then be seriously contended that the 1926 Act, merely by enacting Section 274 (e), which provides for the assertion of claims for additional deficiencies at or before the hearing, actually revived additional deficiencies in tax never before and not then yet claimed and which, according to the 1924 Act, were already barred when the 1926 Act went into effect? Can it be seriously contended that the 1926 Act gave to Section 277 (b) an import so extended that it not only suspended the statute of limitations as to taxes which were the subject of a pending Board appeal at the time the 1926 Act went into effect, but also actually operated to revive additional taxes never before claimed and not then yet claimed and which were barred before that Act became effective? The 1926 Act obviously intended within certain limits to convert appeals pending before the Board at the time it went into effect from proceedings under the 1924 Act to proceedings under the 1926 Act. But there is absolutely nothing in the 1926 Act which makes it retroactive to the extent of reviving through the instrument of pending Board appeals taxes never before claimed and already barred at the time it went into effect.

In the first place, Sections 273 and 274 of the 1926 Act, relating to deficiencies and proceedings with respect thereto, expressly apply to taxes imposed by the 1926 Act and not to taxes imposed by previous Revenue Acts.

The only sections of the 1926 Act which could pos-
bly be construed as giving a retroactive effect to any
f the provisions of Section 274 (of which subdivision
e) refers to the assertion by the Commissioner of
aims for additional deficiencies) is Section 283 of the
926 Act.

Subdivision (b) of Section 283 relates to appeals
led with the Board before and pending at the time
f the enactment of the 1926 Act. It provides that

> "In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section,"

xcept in certain instances which have no application
o the present proceedings. Subdivision (a) of Sec-
ion 283, referred to in Subdivision (b), provides as
ollows:

> "If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or by any such Act as amended, the Commissioner is authorized to send by registered mail to the person liable for such tax notice of the amount proposed to be assessed, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act."

It further provides that in case of any such deter
nation the amount computed

> "shall be *assessed, collected, and paid* in the sa
> manner and subject to the same provisions a
> limitations (including the provisions in case
> delinquency in payment after notice and dema
> and the provisions prohibiting claims and su
> for refund) as in the case of a deficiency in t
> tax imposed by this title, except as otherw
> provided in section 277 of this Act." (italics ou

This subdivision merely means that the amount
tax computed and covered by registered letter to t
taxpayer shall be assessed, collected, and paid in t
same way and subject to the same provisions and lir
tations as a deficiency in taxes imposed by the 19
Act. Subdivisions (a) and (b) of Section 283, wh
read together, mean simply this: That in cases
Board appeals pending at the time of enactment of t
1926 Act, the powers, duties, rights and privileges
the parties and the jurisdiction of the Board, wi
respect to the manner of assessment, collection, a
payment of the deficiency claimed in the deficien
letter shall be the same as in the case of a deficien
in tax imposed by the 1926 Act. There is nothing
either of these sections or anywhere else which giv
such retroactive and reviving effect to Section 274 (
or Section 277 (b) as will revive an additional
ficiency barred before the enactment of the 1926 A
or as will give to the Commissioner the right to asse
at or before the hearing of a Board appeal, a clai
for additional deficiency long since barred. In t
case of *Russell v. United States*, 278 U. S. 181-18
73 L. Ed. 255, 256, the Supreme Court said in pa

"Manifestly, but for Sec. 278 petitioners would be free from liability under the five year limitation in the Act of 1918, continued by the Act of 1921. If Sec. 278 refers only to assessments made after June 2, 1924, petitioners are not liable.

If an assessment made before that date comes within the ambit of Sec. 278, *its effect would be retroactive;* and certainly it would produce radical change in the existing status of the claim against the petitioners—*would extend for some five years a liability which had almost expired.* United States v. Magnolia Petroleum Co., 276 U. S. 160, 72 L. Ed. 509, 48 Sup. Ct. Rep. 236, declares: *'Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears.'* No plain purpose to change the status of the claim against petitioners as it existed just before June 2, 1924, can be spelled out of the words in Sec. 278 or otherwhere.

Paragraph (e), (2), of Sec. 278 expressly directs that that section shall not affect any assessment made before June 2, 1924. Counsel for the United States maintain that to extend the time for bringing suit thereon does not 'affect' an assessment within the meaning of the paragraph. We cannot agree. Some real force must be given to the words used—they were not employed without definite purpose. The rather obvious design, we think, was to deprive Sec. 278 of any possible application to cases where assessment had been made prior to June 2, 1924.

The legislative history of the Act of 1924 lends support to the conclusion which we have reached. The changes introduced into the Act of (Febru-

ary 26) 1926 (44 Stat. at L. 9, Chap. 27, U. S. C. title 26, Sec. 1272), cannot authorize construction of the earlier one not consonant with the language there employed.

The judgment is reversed." (italics ours)

In the case of *United States F. & G. Co. v. U. S. Use of S. W. Co.,* 209 U. S. 306; 52 L. Ed. 804, 807, the Supreme Court said:

"There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes, as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was *not* meant to act retrospectively, and it ought never to receive such a construction if it is susceptible *of any other.* It ought not to receive such a construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied." (italics ours)

In the pertinent case of *Fullerton-Krueger Lumber Company v. Northern P. R. Co.*, 266 U. S. 435; 69 L. Ed. 367, 368, the Supreme Court said in part:

"Admitting original liability, the Railway Company relied upon the local statute of limitation, fixing six years as the time within which such actions must be begun. To this the reply was that the prescribed period of limitation had been extended by Par. (f), Sec. 206, Federal Transportation Act February 28, 1920, 41 Stat. at L. 456, 462, chap. 91 Comp. Stat. Sec. 10,071¼cc, Fed. Stat. Anno. Supp. 1920, p. 79, which provides: 'The period of Federal control shall not be com-

puted as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal control.'

* * * * * * *

The supreme court of Minnesota held, rightly, we think, that the Transportation Act was *not intended to revive or restore rights of action barred before it became effective.*

'It is a rule of construction that all statutes are to be considered prospective unless the language is express to the contrary, or there is a necessary implication to that effect.' Harvey v. Tyler, 2 Wall. 328, 347, 17 L. Ed. 871, 875; Sohn v. Waterson, 17 Wall. 596, 599, 21 L. Ed. 737, 738; Twenty Per Cent Cases, 20 Wall. 179, 187, 22 L. Ed. 339, 341; Chew Heong v. United States, 112 U. S. 536, 559, 28 L. Ed. 770, 778, 5 Sup. Ct. Rep. 255; Schwab v. Doyle, 258 U. S. 529, 534, 66 L. Ed. 747, 752, 26 A. L. R. 1454, 42 Sup. Ct. Rep. 391. And see Hopkins v. Lincoln Trust Co., 233 N. Y. 213, 135 N. E. 267." (italics ours)

In the case of *Burden, Smith & Co. v. United States,* 32 Fed. (2d) P. 830-831, the Court said in part:

"Payment of taxes referred to in section 611 (made before or within one year after the enactment of the Act) is not overpayment. Therefore the taxes referred to in that section are taxes which are not barred. The tax in this case was barred when paid and is still barred, unless the bar was removed by section 611. Therefore, to defeat recovery by the taxpayer, section 611 must be construed so as retroactively to extend the

period of limitation for collection of taxes therein referred to.

(3) In the first place, a statute should not be given a retroactive effect, unless from the language used it clearly appears that Congress so intended. There is apparently no logical or equitable reason for extending the time in all cases in which a claim in abatement was filed, and there was a stay, without regard to the length of the stay. Section 611 is not clear in meaning, and should not be construed to remove a bar which had already attached when the tax was paid."

In connection with the foregoing discussion, we respectfully direct the Court's attention to the fact that not only were the additional deficiencies in the present cases barred under the 1924 Act, but all liability therefor was extinguished by virtue of Section 1106 (a) of the 1926 Act.

All the waivers in these cases were given and expired prior to the enactment of the 1926 Act. A few of the waivers (Tr. pp. 86, 90, 91, 92, 93, 100 and 101) incorporate the provision of Section 277 (b) of the 1924 Act, providing that the waivers shall expire on the date therein specified, except that if a notice of deficiency is mailed before said date and an appeal is filed with the Board, then the time shall accordingly be extended. Since at the time these waivers were executed, the 1926 Act was not yet in effect, this provision in the waiver for extension in the event of appeal from a deficiency letter, could not have meant an extension for the purpose of permitting the Com-

missioner to assert an otherwise barred claim for additional deficiency under Section 274 (e) of the 1926 Act. It merely meant an extension for the purpose of determining the controversy with respect to the particular deficiency specified in the letter appealed from; in other words, an extension for the purpose of culminating an appeal within the more limited scope of the 1924 Act.

If, in these cases, the taxpayers had acquiesced in the deficiencies and paid the same, instead of filing appeals with the Board, obviously no claims for additional deficiencies could have been asserted under Section 274 (e) of the 1926 Act. If the mere exercise by the taxpayers of their statutory right to appeal to the Board operated to revive an additional deficiency never previously claimed and long since barred, it would in effect impose a severe penalty upon the taxpayer for prosecuting the appeal and thereby rob the appeal of the very benefit which it was designed to confer. It would mean that the statute in one breath gave the taxpayer a right, and in the next breath punished him for exercising that right. Such an effect, we submit, would be grossly at variance with the language and spirit of the Revenue Acts.

(b) The Waivers Given Were Void. Therefore, All Taxes for the Years Covered by Those Waivers are Barred.

Many of the waivers in these cases were signed by the taxpayers after the expiration of the statutory period. We have consistently believed that by virtue of that fact these waivers are void. In view, however, of the recent decision of the United States Supreme

Court in the case of *Charles H. Stange v. The United States,* 75 L. Ed. 195, we avoid reluctantly a further urging of this point. There is, however, an additional defect in the present waivers which is not ruled upon in the *Stange* case. A number of the waivers were approved by the Commissioner after the expiration of the statutory period. Under the provisions of Section 278 (c) of the 1924 Act and the corresponding section of the 1926 Act, the written consent of the Commissioner to an extension by waiver was required. The well-reasoned case of *Joy Floral Co. v. The Commissioner of Internal Revenue,* 29 Fed. 2d, 865, has held that this act on the part of Commissioner must be performed before the expiration of the statutory period in order to give validity to the waiver. It is true that certain recent cases have held that the approval of a waiver by the Commissioner is an administrative rather than a contractual act. Moreover, it might be inferred from the *Stange* case that if the signing of a waiver by the taxpayer after the expiration of the statutory period does not affect the validity of the waiver, the approval of the waiver by the Commissioner after the expiration of the statutory period would likewise not affect its validity. But this precise question was not before the Supreme Court in the *Stange* case, and we respectfully submit that there is a sound basis for distinction between the effect of a tardy execution of a waiver by the taxpayer and a tardy execution of a waiver by the Commissioner. The taxpayer is a free agent and may be bound by his act at any time he performs it. But if the administrative act of the Commissioner in ap-

proving the waiver was prerequisite to its validity, that official act must be performed before the tax became barred by the very statute which required the Commissioner to approve the waiver. In the *Joy Floral* case the Court held that the consent of the Commissioner "shall be executed at a time when the Commissioner still possesses the authority to make an assessment and when he may refuse to consent to any delay in making it."

In the light of the foregoing, we respectfully direct the attention of the Court to the following facts in the present cases:

The second waiver of Leon L. Moise for the year 1918, was signed and approved by the Commissioner on March 25, 1925—25 days after the expiration of the first waiver (Tr. pp. 86-88). For the 1919 taxes of Leon L. Moise, the five-year statutory period elapsed on March 15, 1925. The waiver for that year was not approved by the Commissioner until March 25, 1925—ten days after the expiration of the statutory period (Tr. pp. 100-101). The 1918 tax return for Gerald F. Schlesinger was filed on or before March 25, 1919. The five-year period expired on March 25, 1924. The first waiver of Gerald F. Schlesinger for 1918, expired on March 1, 1925 (Tr. pp. 94-95). The second waiver for 1918 was not approved by the Commissioner until March 25, 1925—twenty-five (25) days after the expiration of the first waiver (Tr. pp. 90-91). The 1919 tax return of Gerald F. Schlesinger was filed March 15, 1920. The five-year period expired on March 15, 1925. The waiver of

Gerald F. Schlesinger for 1919 was not approved until March 25, 1925—ten (10) days after the statutory period had expired (Tr. pp. 92-93). The 1918 tax return for LeRoy Schlesinger was filed March 15, 1919. The five-year statutory period expired March 15, 1924. The 1918 waiver of LeRoy Schlesinger bears no date, but the stamp thereon shows that it was not received earlier than September 19, 1924. This waiver could not have been approved by the Commissioner until after it was received. It bears no approval stamp, but purports to be signed by the Commissioner. The stamp of receipt, however, is dated about six (6) months after the expiration of the statutory period (Tr. pp. 99-100).

III.

THE BOARD ERRED IN DISALLOWING A DEDUCTION FOR LOSS OCCASIONED BY OBSOLESCENCE OF THE TANGIBLE ASSETS OF THE PARTNERSHIP RESULTING FROM PROHIBITION LEGISLATION.

The taxpayers appealed to the Board from such portion of the deficiencies determined in the deficiency letters as resulted from a disallowance by the Commissioner of a deduction for loss occasioned by obsolescence of tangible assets of the partnership. These tangible assets included, on the one hand, leasehold improvements, and on the other hand, furniture, fixtures, and equipment. The obsolescence was occasioned by Prohibition Legislation. The taxpayers contended that they were entitled to a deduction of this loss, apportioned over a period of 18½ months, be-

ginning in 1918 when they first learned that they would be obliged to terminate their business and ending in 1920, when their business was actually terminated by reason of Prohibition Legislation. The Board in its decision denied to the taxpayers the right to make the deductions aforementioned. The decision of the Board in this behalf does not appear to have been based upon any dispute of the proposition of law that loss resulting from obsolescence of the tangible assets of the partnership occasioned by Prohibition Legislation constituted an allowable deduction from gross income. It has often been held that such a deduction is allowable.

Fraser Brick Co. v. Commissioner of Internal Revenue, 10 B. T. A. 1252;

Multibestos Company v. Commissioner of Internal Revenue, 6 B. T. A. 1060;

Boggs & Buhl v. Commissioner of Internal Revenue, 34 Fed. (2d) 859, 860;

The Winter Garden, Inc. v. Commissioner of Internal Revenue, 10 B. T. A. 71;

Appeal of Manhattan Brewing Company, 6 B. T. A. 952;

Appeal of Mary M. Dowling, 6 B. T. A. 976;

Appeal of Northern Hotel Company, 2 B. T. A. 1000.

The adverse decision of the Board on this phase of the cases was apparently based entirely upon the opinion of the Board that the evidence was insufficient as to the value of the tangible assets to warrant an allowance of the deduction claimed (Tr. p. 33). It is our contention that under the law the evidence was

entirely sufficient to warrant an allowance of the deduction, and that accordingly the decision of the Board disallowing the deduction was erroneous.

Ox Fibre Brush Co. v. Blair, 32 Fed. (2d), 42, 45.

The Evidence and the Board's Criticism Thereof.

The evidence on this phase of the cases consisted of the testimony of LeRoy Schlesinger and the ledger of the copartnership. This evidence is wholly undisputed.

(1) Leasehold Improvements.

The Board found that the partnership of Schlesinger & Bender was formed on July 1, 1918, and dissolved on January 16, 1920, at which time its business was terminated (Tr. p. 25); that prior to the formation of the partnership the business was conducted by the taxpayers through a corporation (Tr. pp. 25-26); that the premises and plant occupied by the partnership in its business were leased from H. Levi & Co. in 1910; that the term of the lease was fifteen years; that the lease provided that all additions, such as improvements and fixtures, should be made at the lessee's expense, and at the cancellation or termination of the lease should revert to the lessor (Tr. p. 26); that the lease also provided that no business other than that of the lessee should be conducted on the premises (Tr. p. 26); that the partnership had on its books an item of $7200, the balance remaining in its "building" account (Tr. p. 26). In the body of its opinion the Board found that this sum of $7200 rep-

resented *money expended* in building vats and fixtures, and also building a cellar in the leased premises (Tr. p. 33). The ledger account introduced in evidence showed that depreciation was taken at the rate of 10% per annum (Tr. p. 65). The testimony of LeRoy Schlesinger was undisputed. He testified that the $7200 shown in the ledger was what remained on the "building" account, after deduction of 10% per annum for depreciation; that it was money which the partnership had actually spent in building vats and fixtures and also in building a cellar in the leased premises (Tr. pp. 63-64). He also testified that the item "building" also covered an office that the partnership built in the leased premises (Tr. p. 64). He also testified that the building was vacated on or about April 15th, or May 1st, of 1920, but that the premises were not used for the business after January 16, 1920 (Tr. pp. 72-73). The undisputed evidence also shows that the lease was terminated and the leasehold improvements accordingly forfeited (Tr. pp. 72-74).

The criticism made by the Board of the foregoing evidence is substantially as follows:

That there is insufficiency of evidence as to the value of the tangible assets; that the testimony of LeRoy Schlesinger that the $7200 in the "building" account represented money which had been expended in building vats and fixtures and a cellar in the leased premises does not mean more than that costs of the character referred to were entered in the ledger account, and that after adjustments for depreciation,

and possibly for other reasons, the balance of $7200 remained; that it does not appear how the book values were computed; that there is no proof of costs or appropriate rates of depreciation, nor a segregation or identification of the assets upon which the obsolescence was predicated (Tr. p. 33).

We respectfully submit that this criticism of the evidence is wholly unwarranted and unsupported. The sum of $7200 as the balance remaining of actual cost expended is known and certain. The undisputed testimony of LeRoy Schlesinger shows that it represented moneys actually expended by the partnership. The rate of depreciation is fixed definitely both by the testimony of LeRoy Schlesinger and the ledger account at ten per cent per annum. Upon termination of the lease and business, the improvements reverted to the lessor and the partnership received nothing therefor. The evidence to this effect is definite and undisputed. Since the sum of $7200 represented the balance of moneys actually expended by the partnership for leasehold improvements, after figuring a definite depreciation at the rate of ten per cent per annum, and since, when the partnership and lease terminated, this amount was totally lost to the partnership, it is obvious that a deductible loss existed. It is therefore submitted that the findings and decision of the Board on this phase of the case are contrary to the evidence and without support in the evidence and that the evidence was entirely sufficient under the law to warrant the deduction claimed.

(2) Furniture, Fixtures and Equipment.

The Board found with respect to this phase of the case that there was a balance in the "furniture and fixtures" account of $13,965.03; that upon closing its affairs early in 1920, the partnership sold its furniture and equipment, but that no entries of such sales were made on its books (Tr. p. 26).

Paragraph 5 (b) of the amended answers admits the allegations contained in Subdivision (b) of paragraph 5 of the petitions. These allegations were to the effect that the sum of $7801.18 was the total proceeds from the sales of cooperage, scrap and office furniture (Tr. pp. 7, 17). Moreover, the testimony of LeRoy Schlesinger shows that the entry of what these items were sold for was made in a little pass book (Tr. p. 74). LeRoy Schlesinger also testified that $13,965.03 remained in this account on December 31, 1918 (Tr. p. 63). The ledger shows a balance on June 30, 1918, of $13,965.03 in this account (Tr. pp. 66, 67). It also shows all purchases made in this account, including the costs and items purchased. It also gives the rate of depreciation charged off yearly and shows the balance remaining. It must be remembered that the partnership took over all of the assets of the corporation on July 1, 1918, and the fact that it continued to use the same books as the corporation is evidenced by the ledger sheet (Petitioner's Exhibit 1), showing entries beginning as early as January 1, 1916. The ledger sheet also shows the rate of depreciation to have been ten per cent per annum.

The Board's criticism of the evidence bearing upon this phase of the case is substantially the same as that bearing upon the matter of leasehold improvements. We respectfully submit that this criticism is wholly unfounded and that the evidence is entirely sufficient under the law to warrant the deduction claimed.

The undisputed evidence shows that the cost of the furniture and fixtures was $13,965.03 after all deductions for depreciation (Tr. pp. 66, 67). The rate of depreciation, to-wit: ten per cent per annum, was also established. The amount received from the sale of the furniture and fixtures was $7801.18. The loss sustained by the partnership in this behalf is the difference between the two last-mentioned figures. The original costs of a considerable number of the items comprising this sum of $13,965.03 are reflected in the ledger sheets (Tr. pp. 66, 67). Determination of the original costs of the remaining items is merely a matter of mathematical computation, since the rate and amounts of depreciation were established. We submit that the Board's decision is therefore wholly unsupported by its own findings and is wholly contrary to the evidence.

We respectfully call to the attention of the Court the following decisions:

Fraser Brick Co. v. Commissioner of Internal Revenue, 10 B. T. A. 1252;

Multibestos Company v. Commissioner of Internal Revenue, 6 B. T. A. 1060;

Boggs & Buhl v. Commissioner of Internal Revenue, 34 Fed. (2d) 859, 860;

The Winter Garden, Inc. v. Commissioner of Internal Revenue, 10 B. T. A. 71;

Appeal of Manhattan Brewing Company, 6 B. T. A. 952;

Appeal of Mary M. Dowling, 6 B. T. A. 976;

Appeal of Northern Hotel Company, 2 B. T. A. 1000.

We respectfully submit that the cases cited above clearly indicate that it was necessary for the taxpayer merely to prove the unextinguished cost of the property with respect to which deduction is made. In the present cases there is no difficulty in arriving at the figures of unextinguished cost.

We therefore urge that the taxpayers are entitled to a deduction from gross income for the sum remaining in their building account and for the sum remaining in their furniture and fixtures account less amounts received by way of salvage; which deductions should be allocated over the period beginning July 1, 1918, and ending on January 16, 1920.

Section 143, Regulations 45;

Section 214 (a) 8 of the Revenue Acts of 1918 and 1921;

Dean etc. v. Hoffheimer Bros. Co., 29 Fed. (2d) 668;

Lynch v. Alworth-Stephens Co., 267 U. S. 364; 69 L. Ed. 660;

Pittsburg Hotel v. Commissioner, 43 Fed. (2d) 345.

IV.

PETITIONERS WERE ENTITLED TO A DEDUCTION FOR LOSS OCCASIONED BY OBSOLESCENCE OF THE GOOD WILL OF THE PARTNERSHIP BUSINESS DUE TO PROHIBITION LEGISLATION.

The Commissioner allowed to the petitioners a deduction for loss occasioned by obsolescence of good will of the partnership business. As previously indicated, the Board disallowed the deduction, basing its action upon certain defensive allegations of the amended answers alleging that the Commissioner had erred in allowing the deduction. We have pointed out in a previous portion of this brief that the injection of this issue in the Board appeals was error. The Commissioner offered no evidence to support the defensive allegations of the amended answers. Therefore as far as the facts are concerned the propriety of the deduction with respect to obsolescence of good will is conceded. The question of law remains.

In the case of *Jesse W. Clark, etc. v. The Haberle Crystal Springs Brewing Company,* decided on January 27, 1930, 74 L. Ed. 498, the Supreme Court of the United States disallowed a deduction claimed for loss resulting from obsolescence of the good will of a brewery business occasioned by Prohibition Legislation. This decision was rendered subsequent to the filing in these proceedings of the petitions for review. The following language from the opinion of Justice Holmes in that case indicates the theory upon which the case was decided:

> "It seems to us plain without help from Mugler v. Kansas, 123 U. S. 623, that when a business

> is extinguished as noxious under the Constitution the owners cannot demand compensation from the Government, or a partial compensation in the form of an abatement of taxes otherwise due."

We respectfully direct the attention of the Court to the fact that the business of these petitioners was lawful until the enactment of legislation against it. The petitioners do not claim compensation from the Government. They claim the right to deduct a loss occasioned by an observance on their part of the law. To deny them an allowance of deduction for heavy losses honestly incurred is to penalize them for obeying the law. This, we submit, is contrary to the intent of Congress. We respectfully urge a consideration of this question on the part of this Honorable Court.

CONCLUSION.

It is respectfully urged that the decisions of United States Board of Tax Appeals in these cases be reversed.

Dated, San Francisco,
February 21, 1931.

JEROME H. BAYER,
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Of Counsel.

Nos. 6179, 6180, 6181-6182

In the United States Circuit Court of Appeals for the Ninth Circuit

LEON L. MOISE, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

GERALD F. SCHLESINGER, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

LEROY SCHLESINGER, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

UPON PETITIONS TO REVIEW ORDERS OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

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CITATIONS

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 6179

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v.

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No. 6180

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DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, respondent

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UPON PETITIONS TO REVIEW ORDERS OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

PREVIOUS OPINION

The only previous opinion in the present cases is that of the United States Board of Tax Appeals (R. 32–36), which is reported in 13 B. T. A. 528.

JURISDICTION

The appeals in the above-entitled cases involve income taxes of Leon L. Moise for the years 1918, 1919, and 1920 in the amounts of $2,146.41, $7,275.23, and $211.66, respectively (R. 39, 40); income taxes of Gerald F. Schlesinger for the years 1918 and 1919 in the amounts of $1,848.86 and $7,182.68, respectively (R. 124, 125), and income taxes of LeRoy Schlesinger for the years 1918 and 1920 in the amounts of $1,529.19 and $219.68, respectively (R. 163, 164, 200, 201), and are taken from decisions (orders of redetermination) of the Board of Tax Appeals entered on December 15, 1928 (R. 39, 124, 163), and December 14, 1928 (R. 163). The cases are brought to this Court by petitions for review filed June 11, 1929 (R. 39–55, 125–140, 164–177, 200–215), pursuant to the provisions of Sections 1001–1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109, 110.

QUESTIONS PRESENTED

1. Whether the respondent in his amended answers made such claims for increased deficiencies as were required to give the Board of Tax Appeals jurisdiction to determine such increases under Section 274 (e) of the Revenue Act of 1926.

2. Whether the assessment and/or collection of all or any part of the deficiencies asserted by the respondent is barred by statutes of limitation.

3. Whether the evidence so conclusively showed that the partnership of which the petitioners were

members was entitled to its claimed deduction for obsolescence of its tangible assets that the Board's refusal to reverse the Commissioner's action in disallowing the deduction should be set aside by this Court.

4. Whether the partnership was properly disallowed a deduction from gross income on account of obsolescence of good will.

STATUTES INVOLVED

The statutes involved will be found in the Appendix.

STATEMENT OF FACTS

The instant cases were consolidated before the Board and the Board made consolidated findings of fact in substance, as follows:

Leon L. Moise, Gerald F. Schlesinger, and LeRoy Schlesinger were equal partners in the firm of Schlesinger and Bender, of San Francisco, California, which was engaged in the wholesale liquor business from the time of its formation, July 1, 1918, until January 16, 1920, the date of its dissolution and termination of business. For many years prior to the formation of the partnership the liquor business of the three individuals had been conducted in the same location as a corporation. The premises and plant occupied by the partnership in the conduct of its wholesale liquor business were acquired under the terms of a lease entered into in 1910 between H. Levi & Co., a California corporation, lessor, and Schlesinger and Bender, Inc., a

California corporation, lessee. The principal terms of the lease provided for the use of certain land and buildings thereon by the lessee or its assigns at a fixed monthly rental for the period of 15 years. The lease also provided that all additions, such as improvements and fixtures, should be made at the lessee's expense and at the cancellation or termination of the lease should revert to the lessor. The lease further provided that no business other than that of the lessee should be conducted on the premises. (R. 25–26.)

Believing that it would be compelled to terminate its business in 1920 by reason of national prohibition legislation, and believing that its leasehold improvements and equipment would be wholly obsolete at that time, the partnership charged off its books as a loss on December 31, 1918, the amounts of $7,200, the balance remaining in its "Building" account, and $13,965.03, the balance remaining in its "Furniture and Fixtures" account.

Upon closing its affairs early in 1920 the partnership sold its furniture and equipment, but no entries of such sales were made on its books. The lease, by virtue of which the partnership occupied its business property, was terminated about April 1, 1930, and shortly thereafter the premises were vacated. (R. 26.)

The partnership filed returns for the period July 1, 1918, to December 31, 1918, and for the years 1919 and 1920.

In its return for the six months' period July 1, 1918, to December 31, 1918, the partnership claimed as a deduction from gross income the sum of $21,848.60 as exhaustion, wear, and tear (including obsolescence) of its tangible properties. The Commissioner disallowed this sum as a deduction and refused to allow any amount as a deduction for the obsolescence of tangible property of the partnership.

In its return for the year 1920 the partnership included in its gross income that year the sum of $7,801.18 representing the proceeds received from sales of cooperage, scrap, and office furniture.

In its returns filed for the period July 1, 1918, to December 31, 1918, and for the years 1919 and 1920, the partnership claimed certain amounts therein as deductions from gross income for the obsolescence of good will. The Commissioner, in a letter dated October 22, 1924, signed by A. Lewis, head of division, and addressed to Schlesinger and Bender and received by it, informed the partnership that the correct amount of $52,814.70 was allowed the partnership as obsolescence of good will for prohibition purposes, and indicated its distribution over the three years 1918, 1919, and 1920.

Each of the petitioners involved in these proceedings filed individual income tax returns covering the years in which deficiencies have been asserted. (R. 27.)

The return of Leon L. Moise for the year 1918 was filed with the Collector in the First District of

California not later than March 15, 1919. His return for the year 1919 was filed with the Collector in the same district of California not later than March 15, 1920.

An undated income and surtax written consent covering 1918 and expiring March 1, 1925, bearing the purported signatures of Leon L. Moise and D. H. Blair, Commissioner, acknowledged January 4, 1924, was filed with the Commissioner. An income and profits tax consent for 1918 dated February 3, 1925, and expiring December 31, 1925, was executed and filed by the same petitioner. The said petitioner also signed a written consent covering 1919, dated February 3, 1925, and expiring December 31, 1925. Both of the two last-mentioned consents were stamped approved March 25, 1925, and signed by D. H. Blair, Commissioner of Internal Revenue.

The return of Gerald F. Schlesinger for the year 1918 was filed with the Collector at Chicago, Illinois, not later than March 22, 1919. This return bears the stamp "Collector of Internal Revenue, Paid March 15, 1919, Cashier—A, Chicago, Illinois." It also bears the stamp "Collector Int. Rev. March 22, 1919." This return was sworn to under date of March 20, 1919. The return for the year 1919 was filed with the Collector in the First District of California, March 15, 1920. (R. 27–28.)

An income and surtax waiver dated February 25, 1924, covering 1918 and expiring March 1, 1925, and bearing the purported signatures of Gerald F.

Schlesinger and D. H. Blair, Commissioner, was filed with the Commissioner. An income and profits tax waiver for 1918, dated February 3, 1925, and expiring December 31, 1925, was signed by Gerald F. Schlesinger and filed on the said date. He likewise signed an income and profits tax waiver covering 1919 dated January 30, 1925, and expiring December 31, 1925. Both of the two last-mentioned waivers were stamped approved March 25, 1925, and signed by D. H. Blair, Commissioner of Internal Revenue. (R. 28–29.)

The return of LeRoy Schlesinger for the year 1918 was filed with the Collector in the First District of California not later than March 15, 1919.

The petitioner, LeRoy Schlesinger, executed an undated income and surtax waiver for the year 1918 expiring March 1, 1925. This document was accepted on January 4, 1924, and bears on its reverse side the stamp "Personal Audit #4, September 19, 1924, Received."

On July 29, 1925, the respondent issued 60-day letters to petitioner Moise and Gerald F. Schlesinger, notifying them of his final determination of the deficiencies hereinabove set forth. On September 4, 1925, the respondent notified petitioner, LeRoy Schlesinger, that his claim for abatement had been rejected. (R. 29.)

Petitioners allege in paragraph 5 (c) of their petitions as follows:

> The Commissioner in his letter dated October 22, 1924, file IT: PAP4–GWF–406 al-

lowed as a deduction to Schlesinger and Bender obsolescence of good will amounting to $52,814.70 apportionable between the years 1918, 1919, and 1920, as follows:

1918, 12/37	$17,129.09
1919, 24/37	34,258.19
1920, 1/37	1,427.42
As above	52,814.70

(R. 29–30.)

Upon motions made and duly granted by the Board the Commissioner filed amended answers in each of these proceedings, in paragraph 4 (a) of which he denies that he had erred in refusing to allow a deduction from gross income of the partnership of which the petitioners were members for obsolescence of tangible property and affirmatively alleged in Docket 8036, LeRoy Schlesinger, "that the Commissioner erred in not including in the petitioner's income for the year 1918, $5,709.70, and for the year 1919, $11,419.39, said amounts being the petitioner's distributive interest in $52,814.70 deducted for the taxable years 1918 and 1919 by Schlesinger and Bender as obsolescence of good will."

In paragraph 5 (c) of his amended answer in this proceeding the Commissioner states as follows:

> Admits the allegations contained in subdivision (c) of paragraph 5 of the petition and alleges that the obsolescence of good will, amounting to $52,814.70, deducted by Schlesinger and Bender as alleged in subdivision

> (c) of paragraph 5 of the petition is not allowable deduction to said copartnership. (R. 30.)

In the amended answer in Docket 7453, Leon L. Moise, the Commissioner, denied that he had erred as alleged in paragraph 4 (a) of the petition and "alleged that the Commissioner erred by not including in the petitioner's income for the year 1918, $5,709.70; for the year 1919, $11,419.39; and for the year 1920, $475.80, said amounts being the petitioner's distributive interest in $52,814.70, deducted for the taxable years 1918, 1919, and 1920 by Schlesinger and Bender as obsolescence of good will." And, in paragraph 5 (c) of his amended answer in this proceeding, stated as set forth above by the amended answer in Docket 8036, LeRoy Schlesinger. The Commissioner alleged and admitted as set forth above in the proceeding of this taxpayer in Docket 7455. (R. 30–31.)

The amended answer in proceeding of Gerald F. Schlesinger, Docket No. 7454, contained the same admissions and allegations as first above set forth in the proceeding of LeRoy Schlesinger, Docket 7455.

These amended answers, after specifically admitting and denying every allegation of the petition, conclude as follows:

> Denies generally and specifically each and every other allegation contained in the petition of the above-named taxpayer not here-

inbefore expressly admitted, qualified, or denied. WHEREFORE, it is prays that the appeal be denied.

At the hearing of these proceedings counsel for the Commissioner contended for an increase of deficiencies upon the affirmative allegations in the amended answers in respect of the deduction of obsolescence for good will. (R. 31.)

SUMMARY OF ARGUMENT

Section 278 (e) of the Revenue Act of 1926 is by Section 283 (a) and (b) made applicable to these cases which were pending before the Board of Tax Appeals at the time of the passage of the Act. Under that Act the Board had authority to increase the amount of the deficiencies originally asserted by the Commissioner, if claim for such additional deficiencies was asserted at or prior to the hearing. Here the Commissioner asserted claims several weeks before the hearing in amended answers. Even though the Commissioner did not set forth the exact amount of the increased deficiency, he gave sufficient information as to the basis of the increase to enable the taxpayers to compute the amounts. The increases were, therefore, properly asserted.

The increases in the deficiencies stand on the same footing as the deficiencies originally asserted in so far as the statute of limitations is concerned. Section 277 (a) of the Revenue Act of 1924. Assuming the validity of the waivers in the cases of

petitioners Moise and G. Schlesinger, the Commissioner had until December 31, 1925, within which to assess and collect the entire deficiencies, and prior to that date he mailed notices of deficiencies which have suspended the running of the statute until the decision of the Board became final. Section 274 (a) and Section 1001 (c) of the Revenue Act of 1926, the latter as amended by Section 603 of the Revenue Act of 1928 and Section 1005 of the Revenue Act of 1926.

No waiver as to the 1920 deficiency of LeRoy Schlesinger for the reason that the deficiency notice was mailed prior to the expiration of the five-year period of limitations.

As to the 1918 deficiency of LeRoy Schlesinger the Record shows that the notice of deficiency mailed September 4, 1925, followed the rejection of a claim for abatement; a claim for abatement could have been filed only in the event that an assessment was made. (Section 279 of the Revenue Act of 1924.) The Record, however, does not show when the abatement claim was filed or when the assessment was made. The waiver, if valid, extended the period of limitations for both assessment and collection until March 1, 1925. If the assessment was made between June 2, 1924 (the date of the passage of the Revenue Act of 1924) and March 1, 1925, the six-year period for collection under Section 278 (d) of the Revenue Act of 1924 applies, and before that period could have expired the filing of the claim and the filing of the

appeal to the Board suspended the running of the statute until the decision of the Board becomes final. Moreover, even if the assessment was made prior to June 2, 1924, and if the abatement claim was filed prior to March 1, 1925, Section 279 of the Revenue Act of 1924 suspended the running of the statute until the decision of the Board was final. Since if either of these situations exists, the collection of the tax was not barred and since the taxpayer failed to prove that they did not exist it can not be said that the statute of limitations has run.

The waivers were valid even though they were executed by the Commissioner after the expiration of the statutory period of limitation. *Stange* v. *United States,* 282 U. S. 270. Moreover, the Commissioner's signature was not required to give effect to the waivers.

The Board of Tax Appeals held that the taxpayer had not sustained the burden of proving the Commissioner wrong in disallowing as a deduction from the gross income of the partnership of which income they were members for obsolescence of tangible assets due to prohibition legislation. The Board's decision on this question should not be reversed by this Court for the reason that the Record does not show conclusively how the amount deducted was arrived at or that the taxpayer gave proper effect to all items necessarily entering into a computation of a deduction for obsolescence. Hence, the Board's action should be sustained.

The petitioners were not entitled to a reduction of gross income on account of the Supposed obsolescence of good will of the partnership due to the enactment of prohibition legislation. *Clark* v. *Haberle Brewing Co.,* 280 U. S. 384.

ARGUMENT

I

The claims for increased deficiencies were definitely asserted by respondent in exact accordance with the statutory requirements

Section 273 (1) of the Revenue Act of 1926, *infra,* provides that the word "deficiency" as used in respect of a tax imposed by that Act means the amount by which the tax imposed by that Act exceeds the amount shown as the tax by the taxpayer upon his return (with adjustments for previous abatements, refunds, etc.). The definition of "deficiency" under Section 273 (1) of the Revenue Act of 1924 is similar except that it does not limit the application to taxes imposed by the Revenue Act of 1924. This distinction is immaterial because of other provisions in the Revenue Act of 1926, which, as will be pointed out, make the definition applicable to determinations of tax liability for prior years.

Section 274 (e) of the Revenue Act of 1926, *infra,* provides that the Board of Tax Appeals shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the

taxpayer and to determine whether any penalty, additional amount, or addition to the tax should be assessed, "if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing." The Revenue Act of 1924 did not contain a similar provision, Section 274 (b) of that Act provides, however, that if the Board determines there is a deficiency, "the amount as determined shall be assessed, etc.," and in the appeal of *The Hotel De France Co.*, 1 B. T. A. 28, the Board held that it had jurisdiction to determine a greater deficiency than that asserted by the Commissioner. But see *Old Colony Tr. Co.* v. *Commissioner,* 279 U. S. 716.

The petitioners argue that Section 274 (e) of the Revenue Act of 1926, *infra,* is not applicable to the proceedings in these cases, and that even if it were applicable, the Commissioner did not effectively assert a claim for an increased deficiency before the Board as required under Section 274 (e), and hence such portions of the deficiencies found by the Board as exceed the original deficiencies proposed by the Commissioner were improperly determined and can not be assessed and collected.

The first contention that Section 274 (e) does not apply is effectively answered by considering certain other provisions of the statute in relation to the facts in these cases.

It is pointed out that the notices of deficiencies were mailed to the taxpayers and their appeals were taken while the Revenue Act of 1924 was in

effect, but the hearing before the Board occurred after the passage of the Revenue Act of 1926 on February 26, 1926. (Moise, R. 2, 5, 10; G. Schlesinger, R. 2, 109, 113; L. Schlesinger, R. 2, 149, 154, 185, 190.)

Section 283 (b) of the Revenue Act of 1926, *infra,* specifically relates to a case of that character. This Section provides that if before the enactment of the Revenue Act of 1926, an appeal to the Board was taken in accordance with the provisions of the Revenue Act of 1924 and the appeal is pending before the Board at the time of the enactment of the Act the Board shall have jurisdiction of the appeal and "the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts shall (with certain exceptions not here material) be determined, and the computation of tax shall be made in the same manner as provided in subdivision (a) of this section."

Section 283 (a), *infra,* thus referred to, provides that if after the enactment of the Revenue Act of 1926 the Commissioner determines that any assessment should be made in respect of any tax due under the Revenue Acts of 1916, 1917, 1918, 1921, and/or 1924 or under any such act as amended, he is authorized to send to the person from whom such tax is due notice of the amount proposed to be assessed and that such notice for the purposes of the Revenue Act of 1926 shall be considered a notice

under Section 274 (a) of the Act. Section 283 (a) of the Revenue Act of 1926 further provides that in the case of such determination the amount which should be assessed shall be computed as if the 1926 Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in the tax imposed by the Revenue Act of 1926 (with exceptions not material here). It is thus clearly intended by the unambiguous language of Section 283 (a) and (b) of the 1926 Act that the provisions of Section 274 (a) and (2) of that Act shall apply with full force to the situations existing in these appeals. In other words, Section 283 (a) and (b) specifically confer upon the Board the same jurisdiction in respect to appeals pending before it at the time of the enactment of the Revenue Act of 1926 as is conferred in the case of appeals taken thereafter. In this connection attention is called to the fact that in the *Old Colony Tr. Co. case, supra,* the Supreme Court apparently recognized that Section 283 (b) did affect pending proceedings and that in its recent decision in the case of *W. P. Brown & Sons Lumber Co.* v. *Commissioner,* 282 U. S. 283, it held that Section 277 (b) and Section 283 (f) were to be given retrospective effect.

In view of the fact that Section 283 (a) and (b) are unambiguous and clearly were designed to affect pending proceedings, the case of *Russell* v. *United States,* 278 U. S. 181, and other cases cited

by petitioners to the effect that a statute should not be construed with retrospective application, if it is possible to avoid such construction, are not in point. It is pointed out, moreover, that the change effected by Section 274 (e) of the Revenue Act of 1926 was a change in procedure and not in substantive rights, and that statutes which merely affect pending proceedings in the matter of procedure are generally found unobjectionable. *Railroad Co.* v. *Grant,* 98 U. S. 398; *Freeborn* v. *Smith,* 2 Wall. 160; *United States* v. *Heinzen & Co.,* 206 U. S. 370; *Insurance & Title Guarantee Co.* v. *Commissioner* (C. C. A. 2nd), 36 F. (2d) 842.

We come, therefore, to the question as to whether the Commissioner complied with the requirements of Section 274 (e).

The Commissioner of Internal Revenue, in accordance with the provisions of Section 274 (a) of the Revenue Act of 1924, mailed to each petitioner herein the notices of deficiency provided for by law (Moise, R. 10; G. Schlesinger, R. 113; L. Schlesinger, R. 154, 190) on July 29, 1925 (except in the case of LeRoy Schlesinger, the notice of rejection of his claim in abatement of 1918 taxes having been mailed on September 4, 1925, R. 190). From these determinations petitioner appealed to the United States Board of Tax Appeals. (Moise, R. 5; G. Schlesinger, R. 109; L. Schlesinger, R. 149, 185.) The Commissioner of Internal Revenue filed an amended answer to each petition. (Moise, R. 16–18; G. Schlesinger, R. 119–120; L. Schles-

inger, R. 159–160, 195–197.) All such amended answers were filed on April 8, 1927, a date subsequent to the date of the passage of the Revenue Act of 1926.

Examination of the petitions filed with the Board of Tax Appeals reveals that in paragraph 5 (c) the petitioners asserted that the Commissioner had allowed as a deduction to the partnership of Schlesinger & Bender the sum of $52,814.70 as obsolescence of good will, that sum apportionable between the years 1918, 1919, and 1920. (Moise, R. 7; G. Schlesinger, R. 111; L. Schlesinger, R. 151, 187.)

The original answers of respondent (Moise, R. 14–15; G. Schlesinger, R. 117–118; L. Schlesinger, R. 157–158; 193–194) were silent in respect of the error of the Commissioner in allowing a deduction on account of obsolescence of good will.

On April 8, 1927, the respondent amended his answers to the several petitions. (Moise, R. 16–18; G. Schlesinger, R. 119–120; L. Schlesinger, R. 159–160; 195–197.) In the *Moise case,* which is typical, the Commissioner alleged that he had erred in not including in petitioners' income for the year 1918, $5,709.70; for the year 1919, $11,419.39; and for the year 1920, $475.60, said amounts being petitioners' distributive interest in $52,814.70, deducted for the taxable years 1918, 1919, and 1920, by Schlesinger and Bender, as obsolescence of good will. In each amended answer the Commissioner

further admitted the allegations of paragraph 5 (c) in the petition and alleged "that the obsolescence of good will amounting to $52,814.70 deducted by Schlesinger and Bender as alleged in subdivision (c) of paragraph 5 of the petition is not an allowable deduction of said partnership." (Moise, R. 17; G. Schlesinger, R. 120; L. Schlesinger, R. 159–160; 196.) The amended answers of respondent were filed on April 8, 1927, and the causes came on for hearing before the Board on May 4, 1927 (R. 58), at which time petitioners amended their petitions setting up as a further defense to the asserted claims of respondent that the statute of limitations had barred the assessment and collection of the deficiencies involved. (Moise, R. 18–19; G. Schlesinger, 121–122; L. Schlesinger, R. 161–162; R. 197–198.)

At the hearing before the Board counsel for petitioners admitted that the amended answers had been served upon petitioners "two or three weeks prior to the hearing" (R. 59) so that no element of surprise was present such as might have warranted postponement of the hearing.

Petitioners assert that the allegations of respondent's amended answers do not amount to the assertion of a claim in that they are purely *defensive;* that they make no *demand;* and *that they specify no amounts of tax.*

We submit that this argument is not sound. An affirmative allegation of error is not a negative de-

fense. Moreover, to require that the word "claim" in Section 274 (e) of the Act should be so narrowly construed would require the Commissioner to use a more formal procedure in asserting an additional deficiency than he is required to use in asserting the original deficiency under Section 274 (a), a result which would seem unreasonable. The word "claim" is a word of many meanings and its use in Section 274 (e) is indicative of the purpose of the statute which was merely that the taxpayer should not have an additional deficiency asserted against him without warning. The mere fact that the claim for an increased deficiency was not expressed in terms of dollars and cents is of no real significance or importance because a computation of the tax based upon the stated additions to petitioner's gross income would be a simple matter of mathematics. *"Id certum est quod certum reddi potest."* Further than this, the statement of the claim in dollars and cents was not necessary as under the anticipated decision and opinion of the Board it would later become necessary to recompute the tax. This was done. The Board was able to determine the correct tax based in part upon the claim asserted. Moreover, petitioners were fully apprised of the exact nature of and basis for the claim, since in their petitions to the Board they asserted that the Commissioner in an earlier letter had allowed the deduction on account of obsolescence of good will. (Moise, R. 7; G. Schlesinger, R. 111; L. Schlesinger, R. 151, 187.)

The case of *Cement Gun Co.* v. *Commissioner* (D. C. App.), 36 F. (2d) 107, is analogous. In that case the Court said (p. 108):

> In this case the Commissioner, in his amended answer to the Board, set forth the error in his determination of the deficiency for the year 1920 and requested that the deficiencies be increased by the amount of the partial allowance he had made for that year. This correction was made by the Board. The Board in its redetermination of the deficiency was acting clearly within its jurisdiction and authority.

As has been pointed out, the object of pleadings is to put the taxpayer on notice of the claims of the Commissioner, the amount of the resulting deficiencies being simply a matter of mathematical computation in accordance with the law. The record herein fails to reveal in what respect the petitioner has been prejudiced. The character of the amendments to respondent's answers in these cases can not be subject to the criticism of vagueness and indefiniteness, because the amendments specifically allege that the Commissioner erred in allowing certain deductions from gross income on account of the alleged obsolescence of good will of the partnership and state specifically in figures the result upon the gross incomes of these petitioners. That the claims might have gone further and set forth the precise amount does not prove them insufficient, since the resulting tax could easily be ascertained. As the purpose of the requirement

that claim be made is merely to put a petitioner on notice and to place the new matter in issue it would seem from what has been said that every requirement of the Act had been fully met.

II

The statute of limitations has not barred the assessment and/or collection of the deficiencies asserted

(a) Neither all of the deficiencies nor those parts of the deficiencies asserted by the claim set out in respondent's pleadings are barred from assessment and collection, if the waivers are valid

In the interests of clarity the case of each petitioner for each taxable year involved will be discussed separately.

Leon L. Moise

(1918)

The return of Leon Moise for the year 1918 was filed on March 15, 1919. (R. 27–28.)

The normal five-year period for assessment and collection of 1918 taxes would have expired on March 15, 1924. (See Section 250 (d) of the Revenue Act of 1921, Section 277 (a) (2) of the Revenue Act of 1924, Section 277 (a) (3) of the Revenue Act of 1926.) Assuming, for the purposes of explanation here, the validity of the waivers given by petitioner (R. 28), the time within which assessment and collection might have been made was extended to December 31, 1925. On July 29, 1925, the Commissioner of Internal Revenue mailed to petitioner a notice of

deficiency as provided in Section 274 (a) of the Revenue Act of 1924. (R. 10.) Under the provisions of Section 277 (b) of the Revenue Act of 1924 the mailing of the notice and the filing of an appeal from the Commissioner's action placed the statute of limitations in a state of suspense, in which state it will remain until the decision of the Board becomes final. (See Section 274 (a) and Section 1001 (c) of the Revenue Act of 1926, the latter as amended by Section 603 of the Revenue Act of 1928 and Section 1005 of the Revenue Act of 1926.)

Assuming the validity of the waivers, therefore, it is clear that the statute of limitations does not bar the assessment and collection of the deficiency for 1918.

The petitioner, however, urges that in so far as the deficiency found by the Board is attributable to the disallowance of a deduction for obsolescence of good will to the partnership, assessment and collection is barred, since the amended answers in which that part of the deficiency was first asserted were not filed until April, 1927.

We submit that this construction of the statutes is untenable.

Subdivision (b) of Section 277 of the Revenue Act of 1924, which was in effect when the notice of deficiency in this case was mailed, provides that the period within which an assessment is required to be made by subdivision (a) of that Section in re-

spect of "*any deficiency*" shall be extended if a notice of *such deficiency* has been mailed to the taxpayer under subdivision (a) of Section 274. Section 277 (b) of the Revenue Act of 1926, which was in effect when the deficiency was determined by the Board is substantially the same.

Section 277 (a) of both acts provide in effect that the amount of income taxes *imposed* by the earlier acts shall be assessed within certain prescribed periods. It is the tax actually imposed by the act in respect of which the period of limitations is placed in a state of suspense by the mailing of the notice provided for in Section 274 and not merely the exact amount of the deficiency stated to be due in such notice. The definition of the word "deficiency" set forth in Sections 273 (1) of the Revenue Acts of 1924 and 1926 clearly indicates that that word as used in Section 277 (b) of those acts was intended to describe and actually does describe not the amount set forth in the so-called deficiency notice but describes and is intended to describe the difference between the amount shown by the taxpayer on his return to be due and the amount of tax actually imposed by the appropriate act. Further than this, Section 277 (b) of both acts provides that the statute of limitations shall be in a state of suspense *if a notice of deficiency* has been mailed to the taxpayer. The section does not provide, as it easily might have, that the statute of limitations should be in a state of suspense merely to

the extent of the claim asserted in the deficiency letter.

A somewhat similar contention was presented to this Court in the recent case of *Sooy* v. *Commissioner,* 40 F. (2d) 634, where the petitioner in that case contended that the statute of limitations had not placed in a state of suspense a part of the deficiency asserted in the deficiency notice because by his appeal to the Board of Tax Appeals he had placed in dispute only a part thereof and that as to the remainder the statute of limitations had run. This Court in that case said, *inter alia:*

> True, as a ground for his appeal, he (the petitioner) assigned the disallowance of his claimed deduction for bad debts, but that consideration does not alter the fact that his appeal was from the Commissioner's "determination" of his deficiency in the amount of $1,605.85. It could as reasonably be argued that an appeal from a final judgment for a stated single amount does not operate as a *supersedeas* merely because appellant assigns as error only the inclusion in the verdict of interest, or some other item, constituting a part of the amount of the judgment.
> * * * In computing income taxes a statutory rate must be selected appropriate to the total amount of taxable income considered as a single unit, and until there is a determination of such income, in many cases at least, no computation can be intelligently or safely made. * * *. (Italics and parenthetical words supplied.)

If, as the statute indicates, a "deficiency" is the difference between the amount shown by the taxpayer upon his return to be the tax and the tax actually imposed by the Act, then, as in this case, the Commissioner has asserted a deficiency within the statutory period of limitations as extended by valid waiver; and as the period of limitation for assessment of the correct tax liability is extended during the pendency of the appeal and until the decision of the Board of Tax Appeals becomes final, it is clear that the claim for an increased amount of tax was made by respondent during the period of limitations as extended by waiver and by statute, and that such claim was asserted within time.

In the case of *Peerless Woolen Mills* v. *Rose* (C. C. A. 5th), 28 F. (2d) 661, the taxpayer filed a return showing a tax liability of approximately $116,000, of which one-half was paid. The Commissioner of Internal Revenue assessed the tax at the full amount shown by the return which left an unpaid balance of approximately $58,000 claimed as still due. Various waivers were signed by the taxpayer extending the statutory period of limitations for assessment and collection. Finally the Commissioner made a deficiency assessment of approximately $18,000 in excess of the original assessment. Thereupon the taxpayer filed an appeal with the Board of Tax Appeals for a redetermination of the deficiency, claiming that the original assessment was barred by the statute of limitations. While this proceeding was pending the Collector caused

a distraint warrant to be issued and levied upon the taxpayer's property and gave notice that the property would be sold and the taxpayer brought an action to enjoin the Collector.

Upon appeal from the District Court's decision the Circuit Court of Appeals held that a suit to enjoin the Collector of the original assessment would lie under Section 274 (a) of the Revenue Act of 1926, the Board having jurisdiction over the entire controversy. The Court said (p. 662):

> It (the Board) is not bound by the assessment, but has power to raise or lower it, or to hold that there was no deficiency. In order to act intelligently and determine the total amount of tax due, it had the right to inquire whether any part of the tax was erroneously found to be due. By the Revenue Act of 1926 it is provided in section 284 (d) * * * that, if the taxpayer appeal to the Board, he can not sue to recover any part of the tax, but under subdivision (e) of that section the Board was given jurisdiction, if it should find that there was no deficiency, and that the taxpayer had made an overpayment of the tax, to determine the amount of such overpayment and direct that it be credited or refunded. * * *
>
> *We are of opinion that it results from these statutory provisions that, while the Board has no jurisdiction where there is no deficiency assessment, yet, if there is a deficiency assessment, the jurisdiction of the Board extends to the whole controversy, to*

> *the end that it may determine or redetermine the correct amount of the tax.*
>
> The jurisdiction of the Board having been shown to exist, section 274 (a) of the Revenue Act of 1926 * * * is applicable. That section prohibits a proceeding by distraint until the decision of the Board has become final, and confers upon the District Courts of the United States jurisdiction to enjoin collection of the tax, notwithstanding the provisions of R. S. section 3224. Under the admitted facts, we are of opinion that it was error to refuse to issue an injunction. (Italics and parenthetical words supplied.)

From the decision of the Court in the *Peerless Woolen Mills case* it is apparent that the Board had jurisdiction in this case to determine the correct amount of the deficiency, a valid claim for an increased deficiency having been asserted in strict accordance with the statute, and that, under these circumstances, if the Commissioner of Internal Revenue, through the Collector of Internal Revenue, had attempted to collect that part of the deficiency due on account of the disallowance of a claimed deduction on account of obsolescence of good will, such collection would have and could have been the subject of injunction.[1]

That the increased deficiencies are on the same footing as the original deficiencies in so far as the statute of limitations is concerned is further sup-

[1] The *Peerless Woolen Mills case* was cited with approval in a footnote in *W. P. Brown & Sons Lumber Co.* v. *Commissioner*, *supra*.

ported by consideration of the fact that if the petitioner's contentions were carried to their logical conclusion Section 274 (e) could not be given effect in any case where the Commissioner had mailed deficiency letters just prior to the expiration of the statutory period of limitations unextended by waivers, for he would thereafter be entirely precluded from determining any additional deficiency.

If, as this taxpayer here contends, it is necessary for the Commissioner to assert the claim for an additional amount of tax not only at or before the hearing or a rehearing before the Board of Tax Appeals, but also within the time limits of the statute as such may have been extended by waivers and to this extent only, then it is difficult to understand why Congress did not add at the end of Section 274 (e) the proviso that the claim referred to by that section must in all events be not only asserted at or before the hearing before the Board of Tax Appeals but that such must also be asserted prior to the expiration of the statutory period as extended by a waiver and unaffected by the pendency of the appeal.

Leon L. Moise

(1919)

The return of Leon L. Moise for the year 1919 was filed March 15, 1920. (R. 28.)

The normal five-year period for assessment and collection of 1919 taxes would have expired on March 15, 1925. (See Section 277 (a) (2) of the

Revenue Act of 1924; Section 277 (a) (3) of Revenue Act of 1926.) Assuming the validity of the waiver given by petitioner, the time within which assessment and collection might be made would not have expired until December 31, 1925. (R. 28.) On July 29, 1925, the Commissioner of Internal Revenue mailed a notice of deficiency as provided in Section 274 (a) of the Revenue Act of 1924. (R. 10.) The mailing of the notice and the filing of the appeal from the Commissioner's action placed the statute of limitations in a state of suspense in which state it will remain until the decision of the Board becomes final. (See Sections 277 (b) of the Revenue Act of 1924, Sections 274 (a), 1001 (c) as amended, and 1005 of the Revenue Act of 1926, *infra.*)

The same considerations which have been advanced under the heading of "Leon L. Moise—1918," *ante,* are applicable here.

Gerald F. Schlesinger

(1918)

The return of Gerald F. Schlesinger for the year 1918 was filed not later than March 22, 1919. (R. 28.)

The normal five-year period for assessment and collection of 1918 taxes would have expired not later than March 22, 1924. Assuming, for the purposes of explanation here, the validity of the waivers given by petitioner, the time within which assessment and collection might have been made was ex-

tended to December 31, 1925. On July 29, 1925, the Commissioner of Internal Revenue mailed to petitioner a notice of deficiency as provided in Section 274 (a) of the Revenue Act of 1924. (R. 113.) The mailing of this notice and the filing of the appeal from the Commissioner's action placed the statute of limitations in a state of suspense, in which state it will remain until the decision of the Board becomes final. See Sections 277 (b) of the Revenue Act of 1924, 274 (a), 1001 (c) as amended and 1005 of the Revenue Act of 1926, *infra.*

The same considerations which are advanced in the case of Leon L. Moise for 1918, *ante,* apply with equal force here.

Gerald F. Schlesinger

(1919)

The return of Gerald F. Schlesinger for the year 1919 was filed on March 15, 1920. (R. 28.)

The normal five-year period for assessment and collection of 1918 taxes would have expired on March 15, 1925. Assuming, for the purpose of explanation here, the validity of the waiver given by petitioner, the time within which assessment and collection might have been made was extended until December 31, 1925. On July 29, 1925, the Commissioner of Internal Revenue mailed to petitioner a notice of deficiency as provided in Section 274 (a) of the Revenue Act of 1924. (R. 113.) The mailing of the notice and the filing of the

appeal from the Commissioner's action placed the statute of limitations in a state of suspense in which state it will remain until the decision of the Board becomes final. (See Section 277 (b) of the Revenue Act of 1924; Sections 274 (a), 1001 (c) as amended, and 1005 of the Revenue Act of 1926.)

The considerations which are advanced in the case of Leon L. Moise for the year 1918, *ante,* apply with equal force here.

LeRoy Schlesinger

(1918)

The return of LeRoy Schlesinger for the year 1918 was filed on March 15, 1919. (R. 29.)

The normal five-year period for assessment and collection of 1918 taxes would have expired on March 15, 1924. (See Section 277 (a) (2) of the Revenue Act of 1924; Section 277 (a) (3) of the Revenue Act of 1926.) Assuming for the purpose of explanation here the validity of the waiver given by the petitioner, the time within which the assessment and collection might have been made was extended to March 1, 1925. (R. 29.) Although the record does not reveal the fact that assessment of the deficiency due from LeRoy Schlesinger for the year 1918 was made, it does reveal (R. 190) that a claim in abatement had been made prior to September 4, 1925. Claims in abatement lie only from assessments. The Record does not show when this assessment was made, but if it

was made at any time between June 2, 1924 (the date of the passage of the 1924 Act), and March 1, 1925, the six-year period for collection under Section 278 (d) of the Revenue Act of 1924 applies. *Russell* v. *United States,* 278 U. S. 181. In such case there is no question of the right to collect the tax having expired between March 1, 1925, and September 4, 1925, and the filing of the claim had further suspended the period of limitations before the six-year period could possibly have expired. Section 279 (a) of the Revenue Act of 1926, *supra.*

Moreover, even if the assessment was made prior to June 2, 1924, provided the abatement claim was filed at any time prior to March 1, 1925, Section 279 (a) operated to suspend the period of limitations for collection before it had taken effect.

Since these facts are material and the taxpayer has offered no proof either as to the date of the assessment or the date of the filing of the abatement claim, he failed to overcome the presumption that the Commissioner acted lawfully in making the assessment.

The taxpayer has not established, therefore, that the right to collect the tax had not expired between March 1, 1925, and September 4, 1925. On the latter date the Commissioner of Internal Revenue notified this petitioner of the rejection of his claim in accordance with the provisions of Section 279 (b) of the Revenue Act of 1924 (R. 190) and petitioner appealed to the Board of Tax Appeals (R. 185 *et seq.*). As the claim will not have been

finally disposed of until the decision of the Board of Tax Appeals becomes final, the statute of limitations continues in a state of suspense and will so remain. (See Section 279 (a) of the Revenue Act of 1924, 1001 (c) as amended, and 1005 of the Revenue Act of 1926.)

LeRoy Schlesinger

(1920)

The return of LeRoy Schlesinger for the year 1920 was filed either on March 15, 1921, or on April 6th or 7th. (R. 83–84, 165.)

The normal five-year period for assessment and collection of 1920 taxes would have expired on March 15, 1926 (or April 6, 1926, as contended by petitioner, Brief, 25). On July 29, 1925, within the statutory period of limitation for assessment and collection, the Commissioner of Internal Revenue mailed to petitioner a notice of deficiency as provided for in Section 274 (a) of the Revenue Act of 1924. (R. 154.) The mailing of this notice and the filing of the appeal from the Commissioner's action placed the statute of limitations in a state of suspense in which state it will remain until the decision of the Board becomes final. See Sections 277 (b) of the Revenue Act of 1924; Sections 274 (a), 1001 (c) and 1005 of the Revenue Act of 1926.

The record reveals no waivers filed by LeRoy Schlesinger covering the year 1920 and none are necessary as the deficiency notice was mailed within

the five-year period provided for assessment and collection unextended by waivers.

(b) The waivers given by the petitioners are valid

Moise and G. Schlesinger

The petitioners Moise and G. Schlesinger filed waivers with respect to the taxable years 1918 and 1919, which expired December 31, 1925. (R. 28–29.) As to the year 1918, the waivers were executed by both the petitioners and the Commissioner after the expiration of the statutory period of limitations and as to the year 1919 the petitioners' signatures were affixed prior to and the Commissioner's subsequent to the expiration of the statutory period of limitations. Prior to that time consents were filed which bore the purported signatures of petitioners, but which were repudiated by them. We believe that the waivers which petitioners admitted filing were valid, and hence do not rely upon the disputed waivers.

The waivers were executed while the Revenue Act of 1924 was in effect. Under Section 278 (c) of the Revenue Act of 1924, if valid, they extended the period of limitations to December 31, 1925, and as pointed out in subdivision (a) of this argument the deficiencies were asserted within the period.

The validity is challenged by the petitioners on the ground that they were executed by the Commissioner after the expiration of the statutory period of limitations. The petitioners concede (Br. 41–42) that the Supreme Court has held that

the fact that a waiver is executed by a taxpayer after time for assessment and collection has run does not invalidate them (*Stange* v. *United States,* 282 U. S. 270; *Aiken* v. *Burnet,* 282 U. S. 277; *W. P. Brown & Sons Lumber Co.* v. *Burnet, supra*), but argue that the *Stange case* does not control this case and that the Commissioner's signature must be affixed prior to the expiration of the statutory period.

This argument loses all force when it is remembered that the taxpayer's signature to a waiver is normally affixed prior to the time that the Commissioner's signature is affixed. *Moreover,* in the *Stange case* is affirmatively appeared that both signatures were affixed after the running of the statute and the waivers were nevertheless held to be valid.

Obviously, there is less reason for requiring that the Commissioner's signature be affixed prior to the running of the statutory period of limitations than there is for requiring the taxpayer's signature to be affixed prior to that time. It is now well settled that the provision for the Commissioner's signature did not make a waiver a contract but was inserted purely for administrative purposes.

In the case of *Stange* v. *United States, supra,* the Supreme Court said (p. 543):

> * * * a waiver is not a contract, and the provision requiring the Commissioner's signature was inserted *for purely administrative purposes* and not to convert into a

> contract what is essentially a voluntary, unilateral waiver of a defense by the taxpayer. (Italics supplied.)

and in *Aiken* v. *Burnet, Commissioner, supra*, the same Court added (p. 545):

> Even after the Act of 1921, a so-called waiver was not a contract. The requirement in Section 250 (d) of that Act that the Commissioner sign the consent *was inserted to meet exigencies of administration*, and not as a grant of authority to contract for waivers. (Italics supplied.)

Again, in *Burnet* v. *Chicago Railway Equipment Co.*, Prentice-Hall Federal Tax Service (1931) Vol. I, p. 54, the Court used similar language saying "the Commissioner's signature was required purely for administrative purposes."

It is our position that the Commissioner's signature is not essential to give effect to the waivers and in any event that the fact that they were signed after the running of the statute did not invalidate them.

It is submitted, therefore, that the waivers of February 3, 1925, were valid waivers and that they effectively suspended the running of the statute of limitations until after the date of the mailing of the deficiency notices from which the appeals herein have been taken.

L. Schlesinger

We have pointed out in subdivision (a) of this argument that no waiver was signed by this tax-

payer for the year 1920 and that none was required for the reason that the deficiency notice was mailed prior to the expiration of the five-year period of limitations.

The waiver which was filed in respect to the year 1918 extended the time for assessment, which would otherwise have expired on March 15, 1924, to March 1, 1925. (R. 29.) The effect of this waiver, if valid, has been pointed out in subdivision (a) under this point. Its validity appears to have been challenged on the same grounds as the waivers of the other two petitioners and what we have said as to them applies with equal force here.

III

The Board of Tax Appeals did not err in sustaining the action of the Commissioner in disallowing as a deduction from gross income the alleged loss supposed to have been occasioned by obsolescence of the tangible assets of the partnership resulting from prohibition legislation

The Board of Tax Appeals did not hold that a deduction for obsolescence of tangible assets resulting from the enactment of prohibition legislation may not under any circumstances be allowed under Section 214 (a) (8) of the Revenue Act of 1918 (See *contra Burnet* v. *Industrial Alcohol Co.,* Prentice-Hall Federal Tax Service, 1931, Vol. 1, p. 850; *Loewers Gambrinus Brewery Co.* v. *Anderson,* Prentice-Hall Tax Service, 1931, Vol. 1, p. 847), but held that in these cases the petitioners had not sustained the burden of proving that the part-

nership was entitled to the deduction claimed which the Commissioner had disallowed.

The Commissioner's determination that the partnership was not entitled to a deduction for depreciation was *prima facie* correct (*Green's Advertising Agency* v. *Blair* (C. C. A. 9th), 31 F. (2d) 96), and the burden of proving the Commissioner's action erroneous in the proceeding before the Board was upon the petitioners. *American Sav. Bank & Trust Co.* v. *Burnet,* 45 F. (2d) 548, and cases cited. Moreover, the question as to whether obsolescence had been sustained by the partnership was primarily a question of fact (See *E. G. Robichaux Co.* v. *Commissioner* (C. C. A. 5th), 32 F. (2d) 780), and this Court should not reverse the Board's action sustaining the Commissioner's determination unless the evidence conclusively showed that obsolescence in the amount claimed was actually sustained.

The Board of Tax Appeals found as facts (R. 25, 26) that Leon L. Moise, Gerald F. Schlesinger, and LeRoy Schlesinger were equal partners in the firm of Schlesinger and Bender, which firm was engaged in the wholesale liquor business from July 1, 1918, to January 16, 1920, the date of its dissolution and the termination of business; that the business had been conducted upon premises which were acquired under the terms of the lease entered into in 1920 between H. Levi & Company, lessor, and Schlesinger and Bender, Inc., a corporation which had

been in existence prior to the organization of the partnership; that the principal terms of the lease provided for the use of certain land and buildings thereon by the lessee or its assigns at a fixed monthly rental for a period of fifteen years; that the lease provided that all additions such as improvements and fixtures should be made at the lessee's expense and that at the cancellation or termination of the lease, these should revert to the lessor; that the lease further provided that no business other than that of the lessee should be conducted on the premises; that, believing that it would be compelled to terminate its business in 1920 by reason of National Prohibition Legislation and believing that its leasehold equipment and improvements would be wholly obsolete at that time the partnership charged off its books as a loss at December 31, 1919, the amount of $7,200.00, the balance remaining in its "Building" account, and $13,965.03, the balance remaining in its "Furniture and Fixtures" account; that upon closing its affairs early in 1920 the partnership sold its furniture and equipment but no entries of such sales were made on its books; that the lease by virtue of which the partnership occupied its business property, was terminated about April 1, 1930 (*sic,* 1920), and shortly thereafter the premises were vacated.

We submit that these findings are not sufficient to establish conclusively that the partnership was entitled to a deduction for obsolescence of its tangible assets used in the liquor business and that

the Board's failure to make further findings is fully explained by the Record. The Board itself made the following summary of the evidence presented (R. 33):

> The first difficulty in granting the petitioners' contention on this point lies in the sufficiency of evidence as to the value of the tangible assets on account of which obsolescence is claimed. The principal evidence presented as to these values was the ledger of the partnership, which showed a balance in the "Building" account at December 31, 1918, of $7,200 and in the "Furniutre and Fixtures" account a balance of $13,965.03. One of the petitioners testified that the $7,200 in the "Building" account represented money which had been expended "in building vats and fixtures and also building a cellar in the building which we had leased," but from an examination of the ledger account it appears that this statement does not mean more than that costs of the character referred to were entered in this account and that after adjustments for depreciation, and possibly for other reasons, the balance of $7,200 remained.
>
> In neither instance do we know how such book values were computed. We have no proof of costs or appropriate rates of depreciation, nor do we have a segregation or identification of the assets upon which the obsolescence was predicated. Neither have we the amount sold or salvaged from the furniture and equipment in 1920. Thus, we have

> no basis on which to determine the amount of obsolescence in either instance. In the absence of evidence the petitioner's contention under this issue must be denied. * * *

An examination of the Record will reveal that the witness, LeRoy Schlesinger, testified that the circumstances surrounding the making of the entries on the ledger were that the $7,200 was what they called a "building account" and "It was customary for us yearly to deduct 10%." (R. 63; Ledger entries referred to—R. 65–67.) It will be noted that the witness did not testify that 10% depreciation was actually deducted but merely that it was *customary* to make such deduction. The actual ledger entries (R. 65–67) are of no assistance whatsoever in determining the question of fact.

Petitioners assert (Br. 48) that the sum of $7,200 was the balance of actual cost remaining. Whether this was true or not is a question which the Board of Tax Appeals was unable to determine from the evidence. So far as the item of $13,965.03 representing alleged loss on account of furniture and fixtures is concerned, the Board of Tax Appeals pointed out that there was nothing in the Record to indicate what amount such furniture and fixtures brought upon sale. Petitioners assert (Br. 49) that subdivision (b) of paragraph 5 of the petitions alleged that the sum of $7,801.18 was the total proceeds from the sales of cooperage, scrap, and office furniture, but examination of the petitions will reveal that the allegation set forth in paragraph 4

(b) thereof is to the effect that the firm of Schlesinger and Bender *reported* in its return of income for the year 1920 the sum of $7,801.18 as income, this being—according to the averment of the petition—the total proceeds from the sale of cooperage, scrap, and office furniture. While respondent admitted in his amended answers that this was true, it does not necessarily follow that the salvage property was sold for this amount. It may have been sold for more or less. The Record fails to reveal the fact.

Petitioner refers to the testimony of LeRoy Schlesinger (Br. 40) and points to the testimony of this witness to support the contention that the Record reveals the sale price of furniture and fixtures. The witness was asked by Mr. Bayer, counsel for petitioner (R. 74): "May I ask one more question: Mr. Schlesinger, when you retired from business in 1920, was any sale made of the furniture and equipment of your business?" To which question the witness replied: "There was * * *. The entry of what it was sold for was only made in a small little pass book covering the amount that we received and was rebated in our income tax of 1920." Upon this state of the Record the question as to what the furniture and fixtures brought upon sale remains highly conjectural. The evidence falls far short of overcoming the *prima facie* correctness of the Commisisoner's determination. The analysis by the Board of Tax Appeals of the testi-

mony and of the evidence upon this point is soundly logical and is in strict conformity with the exact state of the Record. The decision of the Board of Tax Appeals on this point is undoubtedly correct.

IV

Petitioners were not entitled to a reduction of gross income on account of the supposed obsolescence of good will of the partnership

Respondent erroneously allowed the partnership a deduction from gross income on account of the obsolescence of good will, and thus the distributive shares of the partners were reduced and likewise were petitioners' gross incomes. The respondent, recognizing his error, increased petitioners' gross incomes by the inclusion therein of their proportionate shares of the partnership income (Moise, R. 16, 17; Gerald Schlesinger, R. 119; LeRoy Schlesinger, R. 159, 196), and accordingly sought the increase of their taxes. The board of Tax Appeals sustained the action of the Commissioner.

In this respect the case is unquestionably controlled by the decision of the Supreme Court in the case of *Clark* v. *Haberle Brewing Co.,* 280 U. S. 384, in which case that court held that a brewing company was not entitled to a deduction on account of "exhaustion" or "obsolescence" of its good will under the prvisions of Section 234 (a) (7) of the Revenue Act of 1918, which provides that in computing net income there shall be allowed as a de-

duction a "reasonable allowance for the exhaustion, wear, and tear of property used in the trade or business, including a reasonable allowance for obsolescence." The distinctions suggested by petitioners (Br. 53) are not substantial. See also *Red Wing Malting Co.* v. *Willcuts* (D. C. Minn.), 8 F. (2d) 180, affirmed (C. C. A. 8th), 15 F. (2d) 626, certiorari denied, 273 U. S. 763; *Renziehausen* v. *Lucas,* 280 U. S. 387.

CONCLUSION

It is respectfully submitted that the decisions of the Board of Tax Appeals in these cases are correct. Such decisions should be affirmed.

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MARCH, 1931.

APPENDIX

Revenue Act of 1918, c. 18, 40 Stat. 1057:

SEC. 214. (a) That in computing net income there shall be allowed as deductions:

* * * * *

(7) Debts ascertained to be worthless and charged off within the taxable year;

SEC. 218. (a) That individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the fiscal or calendar year upon the basis of which the partner's net income is computed.

The partner shall for the purpose of the normal tax, be allowed as credits, in addition to the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the partnership.

* * * * *

(d) The net income of the partnership shall be computed in the same manner and

on the same basis as provided in section 212 except that the deduction provided in paragraph (11) of subdivision (a) of section 214 shall not be allowed.

SEC. 250. (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

Revenue Act of 1921, c. 136, 42 Stat. 227:

SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the

collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *.

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 273. As used in this title the term "deficiency" means—

(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; * * *.

SEC. 274. (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.

SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—

* * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize

duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(b) The period within which an assessment is required to be made by subdivision (a) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (a) of section 274 and no appeal has been filed with the Board of Tax Appeals, or (2) if an appeal has been filed, then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board.

SEC. 278. (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

SEC. 279. (a) If a deficiency has been assessed under subdivision (d) of section 274, the taxpayer, within 10 days after notice and demand from the collector for the payment thereof, may file with the collector a claim for the abatement of such deficiency, or any part thereof, or of any interest or additional amounts assessed in connection there-

with, or of any part of any such interest or additional amounts. Such claim shall be accompanied by a bond, in such amount, not exceeding double the amount of the claim, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount of the claim as is not abated, together with interest thereon as provided in subdivision (c) of this section. Upon the filing of such claim and bond, the collection of so much of the amount assessed as is covered by such claim and bond shall be stayed pending the final disposition of the claim.

(b) If a claim is filed as provided in subdivision (a) of this section the collector shall transmit the claim immediately to the Commissioner, who shall by registered mail notify the taxpayer of his decision on the claim. The taxpayer may within 60 days after such notice is mailed file an appeal with the Board of Tax Appeals. If the claim is denied in whole or in part by the Commissioner (or by the Board in case an appeal has been filed) the amount, the claim for which is denied, shall be collected as part of the tax upon notice and demand from the collector, and the amount, the claim for which is allowed, shall be abated. A proceeding in court may be begun for any part of the amount, claim for which is allowed by the Board. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired.

* * * * *

(d) Except as provided in this section, no claim in abatement shall be filed in respect of any assessment made after the enactment of

this Act in respect of any income, war-profits, or excess-profits tax.

SEC. 280. If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 273. As used in this title in respect of a tax imposed by this title the term "deficiency" means—

(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; * * *.

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency

to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes, the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * * * *

(e) The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount, or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

(f) If after the enactment of this Act the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subdivision (a), and the taxpayer files a petition with the Board within the time prescribed in such subdivision, the Commissioner shall have no right to determine any additional

deficiency in respect of the same taxable year, except in the case of fraud, and except as provided in subdivision (e) of this section or in subdivision (c) of section 279. If the taxpayer is notified that, on account of a mathematical error appearing upon the face of the return, an amount of tax in excess of that shown upon the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical error, such notice shall not be considered for the purposes of this subdivision or of subdivision (a) of this section, or of subdivision (d) of section 284, as a notice of a deficiency, and the taxpayer shall have no right to file a petition with the Board based on such notice, nor shall such assessment or collection be prohibited by the provisions of subdivision (a) of this section.

SEC. 277. (a) Except as provided in section 278—

* * * * *

(3) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter.

SEC. 283. (a) If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or by any such Act as amended, the Commissioner is authorized to send by registered mail to the person liable for such tax notice of the amount proposed to be assessed, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such determination the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall, except as provided in subdivision (d) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand and the provisions prohibiting claims and suits for refund) as in the case of a deficiency in the

tax imposed by this title, except as otherwise provided in section 277 of this Act.

(b) If before the enactment of this Act any person has appealed to the Board of Tax Appeals under subdivision (a) of section 274 of the Revenue Act of 1924 (if such appeal relates to a tax imposed by Title II of such Act or to so much of an income, war-profits, or excess-profits tax imposed by any of the prior Acts enumerated in subdivision (a) of this section as was not assessed before June 3, 1924), and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of section 284.

Section 1001 (c) as amended by Section 603 of the Revenue Act of 1928:

(c) Notwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies, such review shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review in respect of such portion is duly filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed has filed with the Board a bond in a sum fixed by the Board

not exceeding double the amount of the portion of the deficiency in respect of which the petition for review is filed, and with surety approved by the Board, conditioned upon the payment of the deficiency as finally determined, together with any interest, additional amounts, or additions to the tax provided for by law, or (2) has filed a jeopardy bond under the income or estate tax laws. If as a result of a waiver of the restrictions on the assessment and collection of a deficiency any part of the amount determined by the Board is paid after the filing of the review bond, such bond shall, at the request of the taxpayer, be proportionately reduced.

SEC. 1005. (a) The decision of the Board shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or

(4) Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.

(b) If the Supreme Court directs that the decision of the Board be modified or reversed, the decision of the Board rendered in accordance with the mandate of the Supreme Court shall become final upon the ex-

piration of 30 days from the time it was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(c) If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Board was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(d) If the Supreme Court orders a rehearing; or if the case is remanded by the Circuit Court of Appeals to the Board for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the decision of the Board rendered upon such rehearing shall become final in the same manner as though no prior decision of the Board had been rendered.

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